

No. 11021

United States
Circuit Court of Appeals
For the Ninth Circuit.

CHESTER BOWLES, Administrator, Office of
Price Administration,

Appellant,

vs.

HENRY A. KUCKENBERG, LAWRENCE W.
KUCKENBERG and HARRIET A. KUCK-
ENBERG, co-partners doing business under
the assumed name of KUCKENBERG CON-
STRUCTION COMPANY,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

FILED

JUL 20 1945

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

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Portland, Ore.

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San Francisco, California,
for Appellants.

ALBERT W. GENTNER,
825 Failing Building,
Portland, Oregon,
for Appellees.

In the District Court of the United States
for the District of Oregon

No. Civ. 2290

CHESTER BOWLES, Administrator, Office of
Price Administration,

Plaintiff,

vs.

HENRY A. KUCKENBERG, LAWRENCE W.
KUCKENBERG and HARRIET A. KUCK-
ENBERG, Co-partners doing business under
the assumed name of KUCKENBERG CON-
STRUCTION COMPANY,

Defendants.

AMENDED COMPLAINT

Plaintiff for his complaint against defendants and
after due consideration and order of the above-
entitled court to consolidate the following causes
or counts in a single amended complaint alleges:

I.

In the judgment of the Administrator, the de-
fendants have engaged in acts and practices which
constitute a violation of Section 4(a) of the Emer-
gency Price Control Act of 1942, as amended,
(Pub. L. 421, 77th Cong., 2nd Sess., 56 Stat. 23),
hereinafter called the "Act," in that defendants
have violated Maximum Price Regulation No. 134,
as amended, effective in accordance with the pro-
visions of the Act; and therefore, pursuant to Sec-

tion 205(c) of the Act, the Price Administrator brings this action to enforce compliance with said regulation.

II.

Jurisdiction of this Count is conferred upon the court by Section 205(c) of the Act.

III.

During all the times herein mentioned, there has been in effect, pursuant to the Act, Maximum Price Regulation No. 134, as amended, establishing a maximum price for rentals of construction and road maintenance equipment and machinery. [1*]

IV.

From and including the 3rd day of December, 1942, and until the 30th day of March, 1943, the defendants rented construction and road maintenance equipment and machinery to Goerig Construction Co., a co-partnership, at prices higher than the maximum prices as provided for in said Maximum Price Regulation No. 134.

Plaintiff for a second Count against defendants alleges:

I.

Plaintiff, as Administrator of the Office of Price Administration, brings this action against defendants for treble damages on behalf of the United States pursuant to the provisions of Section 205(e) of the Emergency Price Control Act of 1942, as

*Page numbering appearing at foot of page of original certified Transcript of Record.

amended, (Pub. L. 421, 77th Cong., 2nd Sess., 56 Stat. 23), hereinafter called the "Act."

II.

Jurisdiction of this Court is conferred upon the court by Section 205(c) of the Act.

III.

During all the times herein mentioned, there has been in effect, pursuant to the Act, Maximum Price Regulation No. 134, as amended, establishing a maximum price for rentals of construction and road maintenance equipment and machinery.

IV.

From and including the 3rd day of December, 1942, and until the 30th day of March, 1943, the defendants rented construction and road maintenance equipment and machinery to Goerig Construction Co., a co-partnership, at prices higher than the maximum prices as provided for in said Maximum Price Regulation No. 134.

V.

All of the transactions referred to in Paragraph IV occurred within one year immediately preceding the filing of this Complaint and none of said rentals were for use or consumption other than in the course of trade or business. [2]

VI.

Three times the aggregate amount by which the prices received by the defendants in the transac-

actions herein referred to exceed the maximum prices provided by Maximum Price Regulation No. 134, as amended, equals Fifty-six Thousand Four Hundred Sixty-seven Dollars and Thirty-eight Cents (\$56,467.38).

Plaintiff for a third Count against defendants alleges:

I.

Plaintiff, as Administrator of the Office of Price Administration, brings this action against defendants for treble damages on behalf of the United States pursuant to the provisions of Section 205 (e) of the Emergency Price Control Act of 1942, as amended, (Pub. L. 421, 77th Cong., 2nd Sess., 56 Stat. 23), hereinafter called the "Act."

II.

Jurisdiction of this Count is conferred upon the court by Section 205(c) of the Act.

III.

During all the times herein mentioned, there has been in effect, pursuant to the Act, Maximum Price Regulation No. 134, as amended, establishing a maximum price for rentals of construction and road maintenance equipment and machinery.

IV.

From and including the 1st day of January, 1943, and until the 15th day of September, 1943, the defendants rented construction and road maintenance equipment and machinery to the Buckler Corpora-

tion, George H. Buckler, George H. Buckler, Contractor, George H. Buckler Co., and Oregon Shipbuilding Corporation, all of Portland, Oregon, at prices higher than the maximum prices as provided for in said Maximum Price Regulation No. 134.

V.

All of the transactions referred to in Paragraph IV occurred within one year immediately preceding the filing of this Complaint and none of said [3] rentals were for use or consumption other than in the course of trade or business.

VI.

Three times the aggregate amount by which the prices received by the defendants in the transactions herein referred to exceed the maximum prices provided by Maximum Price Regulation No. 134, as amended, equals Seven Thousand Six Hundred Seven Dollars and Nineteen Cents (\$7,607.19).

Wherefore, Administrator prays for a preliminary and final injunction enjoining the defendants and each of them, their officers, agents, servants, employees, attorneys and all persons in active concert or in participation with defendants from directly or indirectly renting, or offering to rent, construction and road maintenance equipment or machinery at prices higher than maximum prices established therefor in Maximum Price Regulation No. 134, as amended, or agreeing to do anything in violation thereof, or in violation of any regulation or order issued pursuant to the Act establishing

maximum prices for the rental of construction and road maintenance equipment and machinery as heretofore or hereafter amended.

Administrator prays judgment on behalf of the United States of America against the defendants and each of them in the sum of Fifty-six Thousand Four Hundred Sixty-seven Dollars and Thirty-eight Cents (\$56,467.38) on plaintiff's second Count; and for the further sum of Seven Thousand Six Hundred Seven Dollars and Nineteen Cents (\$7,607.19) on plaintiff's third Count.

Administrator prays for such other and further relief as to the Court may seem meet and proper.

McDANNELL BROWN

F. E. WAGNER

Attorneys for Plaintiff [4]

State of Oregon,

County of Multnomah—ss.

Due service of the within Amended Complaint is hereby accepted in Multnomah County, Portland, Oregon thisday of March, 1944, by receiving a copy thereof, duly certified to as such by F. E. Wagner, of Attorneys for Plaintiff.

/s/ ALBERT W. GENTNER

By C. LANG

Attorney for Defendants

[Endorsed]: Filed March 22, 1944. [5]

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Come now the defendants above named and for answer to the amended complaint filed herein:

FIRST DEFENSE

1. Deny each and every allegation therein contained, save and except that defendants admit the terms of the Emergency Price Control Act of 1942 as amended, and admit that the Administrator of the Office of Price Administration issued what is known as Maximum Price Regulation No. 134, as amended.

SECOND DEFENSE

For a defense to the third count, defendants allege:

1. That on January 6, 1944, the defendants Henry A. Kuckenberg and Harriet A. Kuckenberg, pursuant to order of the Honorable Claude McCulloch, Judge of the above entitled court, appeared before F. E. Wagner, attorney for the plaintiff above named, at 1215 Bedell Building, Portland, Oregon, and after having refused to answer any questions or to produce any documents or other evidence on the ground that the answers to said questions or the production of said documents or other evidence might subject them, or any of the above defendants, to a penalty or forfeiture, did, under the compulsion of said order, testify under oath before said attorney for said plaintiff above

named to various questions propounded and asked by said attorney for said plaintiff and produced records requested by said attorney for said plaintiff pursuant to said order, and that the answers to [6] said questions and the records so produced are the basis for the said third count in this amended complaint; that said answers so given and said records so produced and turned over to said attorney for the plaintiff above named related to the rental of construction and road maintenance equipment and the prices charged therefor; that this is an action for a penalty or forfeiture; that pursuant to the provisions of Section 202-A of the Emergency Price Control Act of 1942 and the provisions of the Compulsory Testimony Act of February 11, 1893, the defendants are immune from prosecution for said penalty or forfeiture demanded in the third count herein.

Wherefore, having fully answered said amended complaint, defendants pray that said complaint be dismissed.

/s/ ALBERT W. GENTNER

Attorney for Defendants

Demand is hereby made for a trial by jury.

/s/ ALBERT W. GENTNER

Attorney for Defendants

State of Oregon,
County of Multnomah—ss.

I, Henry A. Kuckenberg, being first duly sworn depose and say that I am one of the defendants in the above entitled action; and that the foregoing Answer to Amended Complaint is true as I verily believe.

Subscribed and sworn to before me this
day of April, 1944.

.....

Notary Public for the State of Oregon. My Commission Expires July 15, 1945.

State of Oregon,
County of Multnomah—ss.

Service of the foregoing Answer to Amended Complaint by copy, as prescribed by law is hereby admitted, at Portland, Oregon, this 8th day of April, 1944.

/s/ F. E. WAGNER

Attorney for Plaintiff.

[Endorsed]: Filed April 8, 1944. [7]

—

[Title of District Court and Cause.]

PRE-TRIAL ORDER

The above matter came on for pre-trial on March 13, 1944, May 22, 1944, and June 12, 1944, before the Honorable Claude McColloch, Judge of the above entitled court, plaintiff appearing by F. E.

Wagner, one of his attorneys, and defendants appearing by defendant Henry A. Kuckenberg and by Albert W. Gentner, their attorney, whereupon the following statement of agreed facts was made, issues were settled and exhibits identified, to-wit:

AGREED FACTS

1. Plaintiff is Administrator of the Office of Price Administration.

2. Defendants are contractors who have been engaged in construction work and who have also been renting construction and road maintenance equipment.

3. Maximum Price Regulation No. 134, Amendment No. 3, became effective on October 22, 1942, and said Amendment No. 3 remained effective until July 1, 1943, at which time Amendment No. 9 became effective.

4. The defendants executed the contract entitled "Plaintiff's Exhibit 1" and received the payment voucher entitled "Plaintiff's Exhibit 2," but defendants do not admit the relevancy of either of said Exhibits or rentals made thereunder.

5. The contract dated November 30, 1942, known as "Defendants' Exhibit 24" was executed by the parties thereto, as was also the agreement [8] dated January 9, 1943, being "Defendants' Exhibit 25."

6. Defendants rented to A. J. Goerig Construction Co. on a fully operated basis tractors, carryalls, and a motor grader, during the months of December, 1942, and January, February, March and

April, 1943. Defendants rendered statements to A. J. Goerig Construction Co., for \$100,100.62 and have been paid \$94,501.80.

7. Defendants rented motor graders fully operated to Buckler Co. etc., in the months of January to July, inclusive, 1943, at the prices and for the number of hours shown in "Plaintiff's Exhibit 6."

8. Defendants rented motor graders fully operated and without driver, and tractors and carryalls fully operated to Lease and Leighland during May to December, inclusive, 1943, at the rates shown and for the hours specified in "Plaintiff's Exhibit 7."

9. This action was brought without any specific authorization from the Administrator of the Office of Price Administration and without the exercise of his discretion concerning this particular action, but the action was instituted on the sole discretion of McDannell Brown, Chief Enforcement Attorney, Portland District, of the Office of Price Administration.

PLAINTIFF'S CONTENTIONS

Plaintiff contends that the contract between Kaiser Co., Inc. and Kuckenberg Construction Co., being "Plaintiff's Exhibit 1," establishes a ceiling price as of March 31, 1942, for fully operated tractors of \$8.60 per hour, fully operated carryalls of \$2.00 per hour, and fully operated graders of \$7.60 per hour, and fully operated tractors and carryalls together of \$10.60 per hour.

Plaintiff contends that defendants rented to A. J. Goerig Construction Co., fully operated tractors at

\$9.00 per hour, fully operated carryalls at \$2.60 per hour, and fully operated graders at \$8.00 per hour, and charged \$2.00 per hour of tractor operation time for unusual wear and tear, by reason of which plaintiff claims an overcharge to A. J. Goerig Construction Co. of \$18,822.46. [9]

Plaintiff further contends that the defendants rented fully operated graders to Lease & Leigland at \$8.00 per hour and without operator at \$6.40 per hour, and fully operated tractors at \$9.09 per hour, and fully operated tractors and carryalls at \$11.60 per hour, by reason of which plaintiff claims an overcharge to Lease & Leighland of \$615.19.

Plaintiff further contends that defendants rented to Buckler Co. etc., fully operated graders at \$8.00 per hour, and by reason thereof claims an overcharge of \$1182.50.

Plaintiff concedes in connection with the A. J. Goerig Construction Co. claim that defendants are entitled to make a showing of actual expenditures on account of unusual wear and tear and admits that the amount of actual expenditures shown to have been made by defendants on account of unusual wear and tear in connection with the A. J. Goerig Construction Co. contract would be a proper offset to the amount claimed by the plaintiff to be an overcharge on the part of the defendants, the total amount of allowable offset, however, not to exceed the sum of \$13,784.50, this amount being the amount charged by defendants for unusual wear and tear at the rate of \$2.00 per hour which was in-

cluded in the previous figures as the amount charged by defendants to A. J. Goerig Construction Co.

Plaintiff contends that the authority to institute this action emanated from General Order No. 3, Revised General Order No. 3, Admin. Order No. 4, teletype June 4, 1943, and memorandum dated April 23, 1943.

Plaintiff contends that any objections by defendants to the rates as provided by Maximum Price Regulation 134 have been waived by said defendants' failure to exhaust their administrative remedies.

DEFENDANTS' CONTENTIONS

Defendants contend that there is no provision in the Regulation for the establishment as of March 31, 1942, of any fully operated rate, and contend that their prices are governed as to bare rental by the provisions of Amendment No. 3 M.P.R. 134, and as to operating and maintenance service by the terms of "Plaintiff's Exhibit No. 4," being letter dated February 5, 1943, [10] from the Office of Price Administration at Washington, D. C. to Kuckenberg Construction Co., with the exception of the price provided therein for diesel motor graders, as to which the defendants contend they are entitled to a rate of \$4.40 per hour instead of \$3.50 per hour, in that the allowance of a rate of \$3.50 per hour by letter from the Office of Price Administration in Washington, D. C., was in violation of Amendment No. 3, M.P.R. 134, which

provides for the allowance of a price bearing a normal relation to the maximum price of a competitive supplier of the same or similar service. Defendants contend that the price bearing a normal relation to the maximum price of a competitive supplier of the same or similar service would be \$4.40 per hour; that the maximum price as allowed by the Office of Price Administration to competitive suppliers of the same or similar service operating on the same job with defendants was the sum of \$4.40 per hour, one of said competitive suppliers having identical costs with defendants, and that refusal to allow a price of \$4.40 per hour is discriminatory and constitutes an arbitrary taking of property without due process of law.

Defendants further contend that the amount paid by the lessee of equipment governs as to whether there has been any violation of the Regulation and not the amount charged and not paid.

Defendants contend that both the amounts charged and the amounts received by defendants in all of the rentals specified by plaintiff were less than the rates allowed to the defendants by Amendment No. 3 M.P.R. 134.

Defendants further claim that the actual expenditures on account of unusual wear and tear in connection with the A. J. Goerig Construction Co. contract exceeded the amount charged or received at the rate of \$2.00 per hour for unusual wear and tear and that they are entitled to an offset for the full amount of the charge.

Defendants further claim that they are immune from prosecution for the penalties demanded from them on account of rentals to Lease & Leigland and Buckler Co. etc.

Defendants contend that this court lacks jurisdiction in the case for the reason that the bringing of this action was not authorized by the [11] plaintiff, but that this action was brought upon the sole authority and discretion of McDannell Brown, Chief Enforcement Attorney at Portland, Oregon, and without the exercise of any discretion by the Administrator of OPA, and on the further ground that the plaintiff was not authorized to delegate to any other person his discretionary power to bring this action, and particularly to said Chief Enforcement Attorney, and that the plaintiff did not in fact delegate or attempt to delegate said authority and discretion to said Chief Enforcement Attorney.

Defendants contend that they offered to plaintiff in good faith to refund to any lessee of equipment any amount which should be found to be a charge in excess of the bare rental charge as established by Amendment No. 3, M.P.R. 134, or the charge for operating and maintenance service allowed by said letter of February 5, 1943, in consideration of the dismissal of this action and that said offer was rejected.

Defendants further contend that the plaintiff granted this privilege to competitors and that refusal to grant said privilege to defendants is arbi-

trary, unreasonable, capricious and oppressive, and violates the Fifth Amendment of the Constitution of the United States.

Defendants do not admit any violation of the regulation but if any violation be established defendants content that such violation was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation.

[12]

PRE-TRIAL EXHIBITS

Plaintiff's:

1. Contract between Kaiser Company, Inc., Contractor, and Kuckenberg Construction Co., Subcontractor, etc.,

2. Certified copy of payment voucher dated April 18, 1942, payable to Kuckenberg Construction Company, with papers attached.

Execution of these two Exhibits admitted by defendants but relevancy denied.

3. Letter dated January 5, 1943, Kuckenberg Construction Company to Construction and Road Maintenance Equipment Board, OPA, Washington, D. C.

4. Letter dated February 5, 1943, Walter Shoemaker, Head Construction and Extraction Equipment Section, Machinery Branch, OPA.

Exhibits 3 and 4 admitted in evidence without objection.

5. Statement, 3 sheets, first headed "Kuckenberg Rentals to A. J. Goerig Const. Co. March 10, 1944."

6. Statement, 2 sheets, first headed "Kuckenberg Rentals to Buckler Company, etc. Andrew Lee Rapp 3-16-44."

7. Statement, 2 sheets, first headed "Kuckenberg Rentals to Lease & Leigland. Andrew Lee Rapp, March 20, 1944."

Defendants admit correctness of rates charged to lessees of equipment and of dates and hours of rentals but deny relevancy of the computations and of the Exhibits themselves.

The following un-numbered Plaintiff's Exhibits were also offered and received in evidence as a part of the record on behalf of the plaintiff.

(a) General Order No. 3 (as amended on October 2 and November 26, 1942) (7 F.R. 7910, 9909)

(b) Revised General Order No. 3 (8 F.R. 8027) as issued by the Administrator on June 10, 1943.

(c) Administrative Order No. 4, Part I, Supplement 7 (OPA Surveys, p. 1; 576 (c) issued by the present Administrator on December 29, 1943.)

(d) Teletype of June 4, 1943, from Regional Enforcement Attorney for the 8th Region to District Enforcement Attorney for the Portland District.

(e) Memorandum dated April 23, 1943. [13]

Defendants'

8. Statement headed "Cost Summary—A. J. Goerig Construction Co., Bremerton Airport Rental of Equipment"

9. Statement headed "Portland Payroll Totals—December 12, 1942, to June 19, 1943"

10. Statement dated April 30, 1943, addressed to A. J. Goerig Construction Company and headed "Hauling Charges"

11. Statement headed "Summary of Invoices", 3 typewritten sheets

Plaintiff objects to introduction of Defendants' Exhibits 8, 9, 10 and 11 and demands proof at the time of trial.

12. Statement dated October 19, 1943, signed Henry A. Kuckenberg and addressed to Prentiss M. Brown, Price Administrator, etc.

13. Statement dated January 6, 1944, signed Harriet A. Kuckenberg and addressed to Chester Bowles, Administrator of the Office of Price Administration, etc.

14. Statement dated January 6, 1944, signed Henry A. Kuckenberg, addressed to Chester Bowles, Administrator of Office of Price Administration, etc.

Plaintiff admits Exhibits 12, 13 and 14 were received by plaintiff.

15. Letter, May 5, 1944, Kuckenberg Construction Co., to Walter Schoemaker, OPA, Washington, D. C.

16. Letter, May 19, 1944, Kuckenberg Construction Co. to Walter Shoemaker, OPA, Washington, D. C.

17. Letter, May 24, 1944, Walter Shoemaker, Head Construction and Extraction Equipment Sec-

tion, Machinery Branch, to Kuckenberg Construction Company.

18. Letter, June 1, 1944, Kuckenberg Construction Co. to Walter Shoemaker, Head Construction and Extraction Equipment Section, etc.

Plaintiff admits the originals of Exhibits 15, 16 and 18 are in possession of plaintiff and that no objection will be raised because said Exhibits are copies, but denies relevancy of Exhibits.

Plaintiff admits authenticity of Exhibit 17 but denies relevancy. [14]

19a to 19-e Photostatic copies of five letters, OPA correspondence

20. Photostatic copies, etc. of correspondence with OPA, 17 pages marked 20-a to 20q, both inclusive.

Plaintiff admits authenticity of letters from Office of Price Administration at Washington, D. C., and as to photostatic copies of carbon copies of letters to the Office of Price Administration in Washington, D. C., that the originals are in the possession of the plaintiff, and that no objection is offered by plaintiff by reason of the fact that photostatic copies of carbon copies are offered, but the relevancy of all of said Exhibits is denied by plaintiff, all objections other than as to relevancy being waived and no further proof of authenticity being required.

21. Document dated March 9, 1944, headed "Sold to A. J. Goerig Construction Company",

"Summary of Equipment Possession by Lessee for OPA Regulation #134 Rental Basis", 15 sheets

22. Computations as to various Buckler companies and Lease & Leighland

23. Statement headed "Hourly Rate Analysis—Bare Rental—Kuckenberg-Goerig Rental, 1942-1943"

Plaintiff objects to admission of these Exhibits and demands proof

24. Contract dated November 30, 1942, signed Kuckenberg Construction Company, Henry Kuckenberg, Partner, addressed to A. J. Goerig Construction Company, accepted by A. J. Goerig Construction Co. and G. W. Walch

25. Agreement dated January 9, 1943, signed Kuckenberg Construction Company, Henry Kuckenberg, Partner, Addressed to A. J. Goerig Construction Company, accepted by A. J. Goerig Construction Co. and G. W. Walch.

Plaintiff admits execution of said contracts.

26. Statement headed "Bremerton Airport—Kitsap County, A. J. Goerig Contract. Recap.-Repairs Bremerton Tractors", etc., 12 sheets

Plaintiff objects to admission in evidence and demands proof.

27. Photograph of "Caterpillar" Diesel D8 Tractor

Received in evidence without objection.

28, 29, 30 Three photographs of Tractors and Carryalls

Plaintiff denies relevancy but does not require further authentication [15]

31. Requisitions from George H. Buckler, Contractor, to Kuckenberg Construction Company, 20 sheets, numbered 1 to 29, both inclusive.

Received in evidence.

Defendants' Answer to Amended Complaint is deemed to be amended to include all of defendants' contentions as hereinbefore set forth.

The foregoing Pre-Trial Order is hereby settled this 14th day of November, 1944.

CLAUDE McCOLLOCH

United States District Judge
F. E. WAGNER

Of Attorneys for Plaintiff
ALBERT W. GENTNER

Of Attorneys for Defendants

[Endorsed]: Filed Nov. 14, 1944. [16]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above cause come on for trial on the 14th day of November, 1944, before the Hon. Claude McCulloch, Judge of the above court, plaintiff appearing by F. E. Wagner, his attorney, and defendants appearing by Henry Kuckenberg and Lawrence Kuckenberg in person and by Albert W. Bentner, their attorney, and the parties having offered evi-

dence and settled upon a pre-trial order, which was signed by the attorneys for both parties and which pre-trial order was signed by the Court and entered herein, and said attorneys having argued and submitted the cause to the Court, the Court now makes the following

FINDINGS OF FACT

I.

The bringing of this action was not authorized by the named plaintiff, but it was brought on the sole authority of the Chief Enforcement attorney of the Office of Price Administration at Portland, Oregon, and without the exercise of any discretion by the named plaintiff.

II.

The only attempted delegation of the authority of the named plaintiff to the Chief Enforcement Attorney of the Office of Price Administration at Portland, Oregon, was made by the Regional Attorney of the [17] Office of Price Administration at San Francisco, California, at a time prior to the date of the only order issued by the named plaintiff purporting to authorize Regional Attorneys to redelegate the authority and discretion of the named plaintiff to bring actions for treble damages against alleged violators of the Emergency Price Control Act.

III.

Defendants do not have and did not have any established ceiling price as of March 31, 1942, for

fully operated tractors, fully operated carry-alls, fully operated graders or fully operated tractors and carry-alls together. Defendants were advised by the Office of Price Administration at Washington, D. C., in a letter dated February 5, 1943, that Section 1399.7 of Maximum Price Regulation No. 134 operated to prevent any establishment of a fully operated rate.

IV.

Plaintiff offered no evidence of any violation by the defendants of Maximum Price Regulation No. 134, As Amended—Construction and Road Maintenance Equipment Rental Prices and Operating or Maintenance Service Charges (hereinafter designated as M P R 134), either during the period that Amendment No. 3 was effective or thereafter during the period in which Amendment No. 9 was effective.

V.

Kuckenberg Construction Company had no established charge in effect on March 31, 1942, for any operating and maintenance service. The Office of Price Administration at Washington, D. C., treated, confirmed and acted upon the letter of Kuckenberg Construction Company of January 5, 1943, as a report pursuant to Sub-paragraph Two of Section 1399.6(b) of said M P R 134, and approved the following maximum charges for operating and maintenance services as charges determined upon the basis of labor rates in effect on March 31, 1942, material prices in effect on that date (not exceeding practi-

cable maximum prices therefor), computed by a method appropriate to the service to be rendered and resulting in prices bearing a normal relation to the maximum price of a competitive supplier of the same or similar service, to-wit: [18]

Crawler Diesel Tractor 89-130 H. D.

with Lights 4 Drum Power Unit \$4.30 per hour

Crawler Diesel Tractor 89-130 H. P.

with Angle Dozer or Bulldozer 4.40 per hour

Crawler Diesel Tractor 89-130 H. P.

with Scraper 4.90 per hour

Diesel Grader All Wheel Drive and

Steer 3.55 per hour

Diesel Grader (Heavy Duty) Cater-

pillar Model 12) 3.75 per hour

VI.

All construction and road maintenance equipment involved in this suit and concerning which evidence was introduced by the plaintiff was leased by Kuckenberg Construction Company to A. J. Goerig Construction Co., to Buckler Co., etc., and to Lease & Leigland on a "fully operated" basis. The Court finds that the consideration therefor did not exceed the aggregate of the maximum rental price provided by M P R 134 for such equipment and the maximum charge provided by M P R 134 for operating and maintenance services furnished by the defendants, and the Court further finds that in determining whether said consideration did or did not exceed said aggregate, the same method of figuring said prices and said charges was used by defendants

as was employed by the Oregon Transfer Co., a competitive lessor of construction and road maintenance equipment, and that said method was suggested by the Office of Price Administration at Portland, Oregon, and approved by the Office of Price Administration at Washington, D. C., and at Portland, Oregon. (See conclusion of law 4a *infra*) CMc.

VII.

Soil conditions and operating conditions at the Airport in Kitsap County near Bremerton, Washington, were misrepresented by A. J. Goerig Construction Co. to Kuckenberg Construction Company to induce [19] Kuckenberg Construction Company to enter into the contract dated November 30, 1942, for the leasing of construction and road maintenance equipment. That material encountered due to soil conditions and operating conditions was such that far greater than ordinary and usual wear and tear on the equipment resulted. To prevent Kuckenberg Construction Company removing said equipment A. J. Goerig Construction Co. agreed to pay \$2.00 per hour for tractor operating time to cover unusual wear and tear upon said equipment. That A. J. Goerig Construction Co. paid Kuckenberg Construction Company \$13,784.50 under said agreement. That actual expenditures of Kuckenberg Construction Company on account of unusual and extraordinary wear and tear and breakages due to said soil conditions and operating conditions and abuse of the equipment by A. J. Goerig Construction Co. amounted to \$33,562.36. Before entering

into said agreement for payment of \$2.00 per hour defendants consulted the Office of Price Administration at Portland, Oregon, and were advised by said Office of Price Administration at Portland, Oregon, that payment for unusual wear and tear should be covered by agreement between the parties and when so contracted for, was a proper charge. Plaintiff has conceded that the amount of actual expenditures by Kuckenberg Construction Company on account of unusual wear and tear would be a proper offset to the amount claimed by the plaintiff to be an overcharge by defendants, to the extent of \$13,784.50.

VIII.

Defendants have proved to the satisfaction of the Court that they acted in good faith in making the charges they did for rental of equipment and furnishing of operating and maintenance services and for the repair of damage caused by unusual wear and tear and breakages and if any of said charges constituted any violation of the Emergency Price Control Act of 1942 or of M P R 134 said violation was neither wilful [20] nor the result of failure to take practicable precautions against the occurrence of the violation.

Based on the pre-trial order herein and the foregoing Findings of Fact the Court makes the following

CONCLUSIONS OF LAW

I.

This action was brought by the Chief Enforcement Attorney of the Office of Price Administration at Portland, Oregon, on his sole discretion and authority without authority from the named plaintiff and without the exercise of any discretion on the part of the named plaintiff and was therefore unauthorized.

II.

M P R 134 does not provide for the establishment of a fully operated rate as of March 31, 1942, for any construction or road maintenance equipment, and any leasing or rental of construction or road maintenance equipment on a fully operated basis on March 31, 1942, does not operate to establish said fully operated rate as a ceiling price upon which any claimed violation of M P R 134 may be based.

III.

That defendants were entitled to charge A. J. Goerig Construction Co. \$2.00 per hour for tractor operating time for unusual wear and tear and that the charge of \$13,784.50 made by defendants was a proper charge for unusual wear and tear.

IV.

That defendants are entitled to offset actual expenditures for unusual wear and tear to the amount of \$13,784.50 against any amount claimed by plaintiff to be an overcharge in connection with the A. J. Goerig Constructions Co. contract.

IVa.

Different interpretations of the applicable regulations being possible the court feels that it is entitled to adopt the interpretation adopted and employed by the administrative agency in dealing with defendants' competitors (see finding of fact VI supra) CMc. [21]

V.

That defendants did not violate the Emergency Price Control Act of 1942 or M P R 134 issued thereunder.

VI.

Defendants are entitled to a judgment that this action be dismissed.

CLAUDE McCOLLOCH

United States District Judge

Dated November 25, 1944.

State of Oregon,

County of Multnomah—ss.

Service of the foregoing Findings of Fact and Conclusions of Law by copy, as prescribed by law is hereby admitted, at Portland, Oregon, this 22nd day of November, 1944.

F. E. WAGNER

Attorney for Plaintiff

[Endorsed]: Filed Nov. 25, 1944.

In the District Court of the United States
for the District of Oregon

Civil No. 2290

CHESTER BOWLES, Administrator,
Office of Price Administration,
Plaintiff,
vs.

HENRY A. KUCKENBERG, LAWRENCE W.
KUCKENBERG AND HARRIET A. KUCK-
ENBERG, Co-partners doing business under
the assumed name of KUCKENBERG CON-
STRUCTION COMPANY,
Defendants.

JUDGMENT OF DISMISSAL

The above cause came on for trial on the 14th day of November, 1944, before the Hon. Claude McColloch, Judge of the above court, plaintiff appearing by F. E. Wagner, his attorney, and defendants appearing by Henry Kuckenberg and Lawrence Kuckenberg in person and by Albert W. Gentner, their attorney, and the parties having offered evidence and settled upon a pre-trial order, which was signed by the attorneys for both parties and which pre-trial order was signed by the Court and entered herein, and said attorneys having argued and submitted the cause to the Court, and the Court having heretofore made Findings of Fact and Conclusions of Law in favor of defendants,

Now, Therefore, based on said Findings of Fact and Conclusions of Law,

It Is Hereby Ordered and Adjudged that this action be and the same is hereby dismissed.

Dated this 25th day of November, 1944.

CLAUDE McCOLLOCH

United States District Judge.

State of Oregon,

County of Multnomah—ss.

Service of the foregoing Judgment of Dismissal by copy, as prescribed by law is hereby admitted, at Portland, Oregon, this 22nd day of November, 1944.

F. E. WAGNER

Attorney for Plaintiff.

[Endorsed]: Filed Nov. 25, 1944. [23]

[Title of District Court and Cause.]

ORDER TO FORWARD EXHIBITS

It appearing necessary that the original exhibit in the above described cause accompany the transcript of record upon appeal to the Circuit Court of Appeals for the Ninth Circuit,

It Is Ordered that the Clerk of this Court forward to the Clerk of the Circuit Court of Appeals for the Ninth Circuit all original exhibits introduced in evidence in this cause.

Dated at Portland, Oregon, this 23rd day of March, 1945.

/s/ CLAUDE McCOLLOCH
Judge

[Endorsed]: Filed March 23, 1945. [24]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Henry A. Kuckenberg, Lawrence W. Kuckenberg and Harriet A. Kuckenberg, Defendants
Above Named, and to Albert W. Gentner, their
Attorney.

Notice is hereby given that Chester Bowles, Administrator, Office of Price Administration, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from that certain judgment dismissing said action, made and entered in the above entitled action on the 25th day of November, 1944.

Dated at Portland, Oregon this 23rd day of February, 1945.

/s/ F. E. WAGNER
/s/ W. DUNLAP CANNON, JR.
Attorneys for Appellant
Chester Bowles,
Administrator

[Endorsed]: Filed Feb. 23, 1945. [25]

[Title of District Court and Cause.]

DESIGNATION OF RECORD

Plaintiff Appellant Chester Bowles, Administrator, Office of Price Administration, hereby designates for inclusion in the record on appeal taken by appellant from the final judgment herein the complete record and all the proceedings and evidence in the action including, without limitation, the following:

1. Amended Complaint
2. Answer to Amended Complaint
3. Pre-trial Order
4. Findings of Fact and Conclusions of Law
5. Judgment of Dismissal
6. Transcript of Pre-trial Conference, March 13, May 22 and June 12, 1944
7. Transcript of Trial Proceedings, November 14, 1944
9. Notice of Appeal
10. This Designation
11. Order to Forward Exhibits

Dated at Portland, Oregon, this 21st day of March, 1945.

/s/ F. E. WAGNER

Of Attorneys for Plaintiff
Appellant [26]

State of Oregon

County of Multnomah—ss.

Due service of the foregoing Designation of Record is hereby accepted in Portland, Multnomah County, Oregon this 22 day of March, 1945, by receiving a duly certified copy thereof.

/s/ ALBERT W. GENTNER

Of Attorneys for Defendants

[Endorsed]: Filed March 23, 1945. [27]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,

District of Oregon—ss:

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered 1 and 28 inclusive constitute the transcript of record on appeal from a judgment of said court in a cause therein numbered Civil 2290, in which Chester Bowles, Administrator, Office of Price Administration, is Plaintiff and Appellant, and Henry A. Kuckenberg, Lawrence W. Kuckenberg and Harriet A. Kuckenberg, co-partners doing business under the assumed name of Kuckenberg Construction Company, are defendants and appellees; that the said transcript has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in

accordance with the rules of this court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designation as the same appears of record and on file at my office and in my custody.

I further certify that I have enclosed under separate cover duplicate transcript of Trial Proceedings filed in this cause together with exhibits Nos. 1 to 35 inclusive.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 30th day of March, 1945.

[Seal]

LOWELL MUNDORFF,

Clerk.

By F. L. BUCK

Chief Deputy. [28]

In the District Court of the United States
for the District of Oregon

Civil No. 2290

CHESTER, BOWLES, Administrator,
Office of Price Administration

Plaintiff

vs.

HENRY A. KUCKENBERG et al.

Defendants

Portland, Oregon, March 13, 1944.

Before:

Honorable Claude McColloch, Judge.

Appearances:

F. E. Wagner, Esq., appearing on behalf of
the plaintiff.

A. W. Gentner, Esq., and John K. Crowe, Esq.,
appearing on behalf of defendants.

Court Reporter:

Ira G. Holcomb.

PROCEEDINGS OF PRE-TRIAL CONFERENCE

Mr. Wagner: This case is set for trial tomorrow, your Honor.

The Court: I have some questions I want to ask, but I will wait.

Mr. Wagner: In connection with some of plaintiff's evidence, one witness employed at the Kaiser Company at Vancouver, had, or has, in his posses-

sion certain documents which the plaintiff, in the event of the question becoming an issue, would like to have subpoenaed. The time is not very long, and if there is any question about the evidence that he has, or what it will show, we would like very much to have an order for a subpoena duces tecum issued this morning. We will develop that a little later on.

At the outset, your Honor, it is the position of the plaintiff that the transactions involved here are the subject of Amendment 3 of the Regulations, which I believe are somewhat different in content and substance than the regulation which is set forth in the copy heretofore given the Court; and we would like very much to supply the Court with a copy, also counsel.

At issue, according to the pleadings, are all the allegations of the complaint.

Paragraph 1 sets forth the application or the applicable provisions of the Price Control Act, and it would seem to me that there should be no denial as to its application.

Paragraph 2 is an allegation relative to the jurisdiction of the Court in the matter.

Paragraph 3 refers to the particular Price Regulations involved.

I submit to your Honor, and to counsel, that Price Regulation 134 became effective May 11, 1942, recorded in 7th [2*] Federal Register 971.

Mr. Gentner: That is the original—

*Page numbering appearing at top of page of original certified Transcript.

Mr. Wagner: That is the original date of the regulation, May 11, 1942. Amendment 1 became effective the same day, and it covered some typographical errors.

Amendment 2 of the Regulations became effective September 8, 1942. It was recorded in 7th Federal Register 3203, and it pertains to the rental of this type of equipment in the State of Michigan, which, of course, does not apply here.

Amendment 3, which is the one we think is involved here became effective October 22, 1942, and was recorded in 7th Federal Register 7871.

All in all, there are fourteen amendments to this Regulation. There are some that became effective at a later date, particularly Amendment 9 which became effective July 1, 1943 which, in some respects, qualifies the issues here involved in Amendment 3. All of the other amendments, I believe, are not relevant and not applicable at all. Some of them cover certain types of rental in Alaska for work that is being done on the Alcan Highway and other projects, and certain allowances were made on these contracts because of the difficult terrain and the transportation item involved. The other amendments really have no application to the issues involved here at all.

In this Regulation, it is the position of the plaintiff [3] that the particular provisions which are applicable are 1399.1.

Mr. Gentner: Just a minute. Let me get that. All right.

Mr. Wagner: That is on page 2 of this amendment. Also, 1399.6, the first section. 1399.1 is the prohibition against the renting of supplies and services at higher than the maximum prices. It has various sub-sections, and, in connection with operating and maintenance services, refers indirectly to 1399.6, which provides the maximum charges for operating and maintenance services. Section "A" is the applicable provision. In substance, that section provides—

Mr. Gentner: That is, Section "A" of 1399.6?

Mr. Wagner: That is right. In substance, that provision provides where a lessor of this type of equipment had established charges in effect during March, or in effect on the 31st of March, 1942, those would be his maximum prices in subsequent transactions. This sub-section also provided or required that such lessor file his established charges on or before November 2, 1942.

To clarify somewhat the rental on the basis of the Regulation, there are two types of rental. One is bare rental; that is, rental covering only the equipment itself. The other is operating and maintenance, or the rental of equipment covering the operating and maintenance of it. That would be a stipulated [4] rental rate for the gasoline, oil, labor and wages of the operator, and possibly some other items.

It is our position that in this particular matter the defendants had, on March 31, 1942, established a rental rate which consisted of or which was based upon two contracts which existed, one that the

Kuckenberg Construction Company had with the Oregon Shipbuilding Corporation, and the other with the Kaiser Company of Vancouver. Those contracts were in effect during the month of March, and the defendants billed both of those corporations for operating and maintenance, together with the bare rental, for services furnished during the month of March.

The violations which are the basis of this complaint consist of a contract between the Kuckenberg Construction Company and the Goerig Construction Company of Seattle, Washington, which became effective in November, I believe, and involved services and rental for the months of December, January, February and March, and, I believe, some in April of 1943. Those rates that were charged the Goerig Construction Company were substantially higher than the base rates that the defendants were required to use, according to the provisions of this Regulation. The difference between those rates amounts to \$18,822.46.

That figure is somewhat different than the Plaintiff originally alleged in its complaint, your Honor, and the allegation or the prayer concerning the amount should be charged accordingly. [5]

There is also at issue, in connection with services and rentals furnished to the Goerig Company at a later date, the question of extraordinary wear and tear due to unusual working conditions on the job. Just exactly what the position of the defendants will be, or is, in connection with that question, I do not know.

It is our position that, before the defendants would be permitted to make a charge for extraordinary wear and tear, it would be necessary for them to establish that there actually was extraordinary wear and tear, and also show what the extent of it was.

The Regulation in that connection provides—and I think very logically—It does not specifically provide anything for extraordinary wear and tear, but it contains a provision that the equipment shall be returned to the lessor in substantially the same condition as it was upon its delivery to the lessee. I believe a reasonable interpretation of that would mean that any repairs that were necessitated to the equipment would be the responsibility of the lessor, but any repairs due to negligence in the operation of the equipment on the part of the lessee or possibly accidental breakage involving extraordinary wear and tear, such as in this particular case which involved the construction of certain revetments, which necessitated the equipment being used in a peculiar and different manner—in turning the equipment around these re- [6] vetments it did cause a certain amount of rock or gravel to pile up and fall into the rollers, and in that way naturally there would be extraordinary wear and tear, and we have no objection to the defendants claiming that and coming in and mitigating the Administrator's claim on the basis of extraordinary wear and tear, but we do feel that they should justify the claim that they might have in that connection by adequate and very convincing evidence.

Mr. Gentner: I would like to ask you to clarify that, if you will. Is it your position that we would be bound to furnish evidence of the actual amount that had been paid out for this wear and tear?

Mr. Wagner: For extraordinary wear and tear. Ordinary wear and tear would naturally be included in the bare rental.

Mr. Gentner: Yes, but I mean on this unusual wear and tear, it would be the actual amount that we paid out, is that the criterion?

Mr. Wagner: I think so. I think that would be the most that would be reasonably allowed.

Mr. Gentner: Is that the basis you want us to proceed to prove—What I am trying to find out, your Honor is just what we have to meet here, and what evidence we should present. What I am trying to find out is the basis on which the Administrator would be prepared to allow mitigation would be the basis of the actual amount paid out on account of unusual wear and tear on these items.

Mr. Wagner: That would seem to me to be logical, yes, unless [7] you differ in your interpretation of the regulations.

Mr. Gentner: No, I think that is right, Mr. Wagner. I think that is proper and that is what should be applied.

Mr. Wagner: The other feature of this case, your Honor, is the injunction—

Mr. Gentner: Might I ask you, before you proceed with that: You have given the figure of \$18,822, and you made the statement that there was

an established charge in effect by virtue of some contracts.

Could you state, or would you state what that charge was, so that we might know just where we stand? What do you claim—what charge do you claim? I think you mentioned two contracts. Which one of them has a different figure in it?

Mr. Wagner: The contract in effect with the Kaiser Company of Vancouver.

Mr. Gentner: The Kaiser Company of Vancouver?

Mr. Wagner: That contract, I believe, provided for a rate on the large type of tractor of \$10.60; that is, for the D-8's. The rates for the D-7's under that contract, I believe, were \$8.60——

Mr. Gentner: There were no D-7's on that job.

Mr. Wagner: At Vancouver?

Mr. Gentner: No, I mean on this other.

Mr. Wagner: On the Goerig job. I think you are right. The rate that was charged by Mr. Kuckenberg on the Goerig job on the wholly operated basis was, I believe, \$11.60, plus \$2 for extraordinary wear and tear, or \$13.60, a difference of \$3 an hour.

Mr. Gentner: Do you have the other rates, too, the rates on carryalls, and so forth?

Mr. Wagner: On the carry-alls, the March 1942 rates were \$2.00.

Mr. Gentner: That is, the Kaiser contract.

Mr. Wagner: I believe so; and on the Goerig job, the carry-alls took a rate of \$2.60.

Mr. Gentner: Is there a combined rate for tractor and carry-all on the Kaiser operation?

Mr. Wagner: I believe, in some instances, there is.

Mr. Gentner: What is that rate?

Mr. Wagner: \$10.60. I believe that is the \$10.60 rate.

Mr. Gentner: That is for the tractor alone, I believe.

Mr. Wagner: \$10.60 would be the combined rate.

Mr. Gentner: The carry-all and tractor?

Mr. Wagner: Yes. The tractor rate is \$8.60, and the combined rate is \$10.60.

Mr. Gentner: This figure of \$18,822.46, that represents the difference between the amount paid or the amount charged? Which? the figure here that you have given on the Vancouver work, irrespective of the \$2.00——

Mr. Wagner: Our position is, whether it is paid or charged, is immaterial. [9]

Mr. Gentner: Would be a difference of some \$5000. I wondered on which basis you figured that.

Mr. Wagner: Either. I mean, the fact that the money has not been paid would make no difference.

Mr. Gentner: Wouldn't know whether this was figured on the charge or the money paid.

Mr. Wagner: Apparently on the charge.

Mr. Gentner: On the charge?

Mr. Wagner: Yes.

Mr. Gentner: And that does not take into consideration this extra \$2, or does it figure that in?

Mr. Wagner: That does take it in. \$18,822.46.

Mr. Gentner: Let's see if I get this right. The \$18,822.46 includes the \$2 charge?

Mr. Wagner: That is right.

Mr. Gentner: So that this was figured on a charge of \$13.60 in order to arrive at this amount, is that right?

Mr. Wagner: That is right.

Mr. Gentner: That is on the tractors only?

Mr. Wagner: The tractors and carry-alls.

Mr. Gentner: Do you have any computation you are going to submit?

Mr. Wagner: We are going to submit everything we have.

Mr. Gentner: You have a computation that shows that?

Mr. Wagner: Yes. [10]

Mr. Gentner: I did not mean to interrupt you. It just occurred to me at that time, and I wanted to ask those questions.

Mr. Wagner: In connection with the injunction feature of the complaint, the allegation includes—the allegation of violation includes only the dates of the 3rd day of December, 1942 to and including the 30th day of March, 1943. Those violations are somewhat stale, and it might be that the Court would desire more recent violations to be submitted before considering the issuance of an injunction. In the other matter pending, which was discussed this morning, the violations are more recent, some of them I believe very nearly current; and, if the Court desires to proceed in that manner, we would

very willingly let the matter of the injunction go until the hearing of that case.

In conclusion, your Honor, the evidence of the plaintiff consists of an original duplicate of a contract dated February 9, 1942, together with change orders——

Mr. Gentner: February 9th?

Mr. Wagner: February 9th. ——between the Kaiser company.

Mr. Gentner: Oh, yes.

Mr. Wagner: Between the Kaiser Company of Vancouver and the Kuckenberg Construction Company; also progress estimates, with the billings under that contract made by the Kuckenberg Construction Company for the period of time March 1, 1942 to March 31, 1942, together with certified invoices and also payment voucher No. 120 [11] drawn on the Clark County National Bank of Vancouver, payable to the Kuckenberg Construction Company, drawn by the Kaiser Company, dated April 18, 1942, in the sum of \$16,089.02, which is payment for this progress estimate. Also——

The Court: I do not see why you make two or three cases. I don't see why you do not make just one case out of your complaints against this particular defendant. You said you want me to hear in this case evidence of these other cases to justify an injunction.

Mr. Wagner: I have no objection, your Honor, none whatsoever. It so happened that during the discovery proceedings, violations were known to have existed, and the period of limitations within

which the Administrator was required to act was drawing very close. That was the reason for filing the complaint at that time. We have no objection to a consolidation of the cases, if the Court would desire it done.

There is a question which was first brought up by the defendant in connection with the discovery proceedings, as to whether or not they had gained immunity under the statute by claiming privilege under the compulsory testimony act. That question has not yet been raised in this particular case, but, other than that, there is no difference in the cases, and also the fact that the transactions involve different concerns, there is no difference in the cases, and we have no objection to a consolidation of the cases whatsoever. [12]

Mr. Gentner: Of course, the other case has not even been filed yet. We could not proceed to trial tomorrow if they were consolidated.

The Court: Certainly not.

Mr. Gentner: There is another point, your Honor——

The Court: Of course, you could not go to trial tomorrow.

Mr. Gentner: There is another point, your Honor. In this complaint, which was the only thing we had to answer, it alleges transactions with the Goerig Construction Company, a Washington corporation. I feel it was necessary to deny that paragraph. We have had no transaction whatsoever, or at all, with the Goerig Construction Company, a Washington corporation. We did have some deal-

ings with an individual by the name of A. J. Goerig, who operated under the name of the Goerig Construction Company, but, as I understand, the Goerig Construction Company, a Washington corporation, is entirely out of existence, and that A. J. Goerig, the man with whom we had our dealings, had a connection with the Goerig Construction Company, a Washington corporation. I had no other alternative than to deny as to any transactions with this corporation. We rented no equipment to this corporation, which is a different set-up entirely from the person that we did have dealings with.

Mr. Wagner: That is right, your Honor. I think it is an immaterial error. In the complaint, we do allege the Goerig Construction Company is a Washington corporation. However, we have [13] been informed since that it is a partnership.

Mr. Gentner: Our information, at least, is that Goerig held himself out as an individual, and he signed the bond and contract for this job as an individual.

Mr. Wagner: I do not see that it makes any material difference at all, whether the transactions were with an individual, a partnership or a corporation; nevertheless, the payments were made, and I do not see how anybody else can be misled or prejudiced by that allegation in the complaint.

The Court: You have to make the formal chances, of course. How many more cases are you going to have against these people?

Mr. Wagner: I hope, none. I hope, not any more, your Honor.

Mr. Gentner: That satisfies us.

The Court: I don't think you need an order permitting you to file any complaint. I have not read the statute closely. I think we ought to try all charges against your client at one time, Mr. Gentner. I do not see any point in going to trial tomorrow, when we will have to try the same thing over again in two or three weeks from now, or two or three months from now.

Mr. Gentner: Then, he will file his complaint, and then we will proceed.

The Court: I guess he is going to.

Mr. Gentner: Then, this hearing will be postponed until the other comes up? [14]

The Court: That is my view of it.

Mr. Gentner: Yes.

The Court: I think all the cases, if they have a close relation from the Government's point of view, should be consolidated and tried at one time.

I would like to hear you on your demand for a jury,—what your ideas are about that.

Preliminary to that, this penalty of treble damages, Mr. Wagner, how does that work in this case? Does that work like in timber trespass cases where a bright jury fixes the value of the actual timber, and then the verdict is multiplied?

Mr. Wagner: My understanding of the statute is that the statute specifically requires that——

The Court: You are talking of timber cases?

Mr. Wagner: Yes. There is no such provision

in the Price Control Act, I believe, that after the establishment of a violation it requires the entry of a judgment for three times the amount involved.

The Court: What has been going on in the rest of the country about that in connection with all of these big cases that we read about that have been filed, where they have run into very large sums, where treble damages have been sustained?

Mr. Wagner: The Supreme Court has not considered [15] the matter.

The Court: Have any of those gone to final judgment in the District Courts anywhere?

Mr. Wagner: I am quite sure, your Honor, that they have.

The Court: Do you have some——

Mr. Wagner: I do not have anything I can cite right now, your Honor, but I will be very glad to review that point for you in a memorandum or otherwise.

The Court: Do you know of any cases that have gone to final judgment, Mr. Gentner?

Mr. Gentner: I do not know of any now, your Honor, either. Of course, it is a very new proposition and, as Mr. Wagner pointed out, there have been repeated amendments of the Act. There was another amendment in July, 1943 that again changes the complexion of this matter.

Your Honor, as I pointed out, we really do not know how to answer the complaint, the way it is now. We had no dealings with the parties set forth in this complaint. I cannot very well answer some complaint, when we had no dealings with the

parties mentioned. I have no way of answering this, except to say that we did not have any dealings with this corporation, which is an entirely different entity from the one which we did have dealings with.

Mr. Wagner: If the Court please, in view of the Court's [16] observation in connection with these matters, I believe the most expeditious manner in which to handle the case would be to file an amended complaint, at which time I will take care of that error. But I would like to add, in connection with the matter of treble damages, the treble damage feature that the Court was making inquiry about, it has been the position of the Administrator, I believe, in all of these proceedings that the treble damage claim is not one for a penalty; but that it is a damage claim. The statute specifically uses the word "damage" in there, and Congress has indicated what the measure of damages is. A violation of price regulations would have a tendency to cause inflation, and then, naturally, it causes damage. Just exactly the extent of that damage is very difficult to ascertain. It is impossible to ascertain in a great many instances, or it is in most instances. Therefore, Congress, in enacting this statute, fixed as the measure of damages the three times proposition.

The Court: What do you do with that money, if you get it?

Mr. Wagner: It goes directly to the United States Treasury, your Honor. Of course, that is where the money came from originally,—for ex-

ample this operation involving the construction of an airport near Bremerton, Washington. It was an Army airport. The United States Government supplied the original consideration. [17]

The Court: That is the kind of an argument I heard here Saturday. You finally met yourself coming back. Excuse me. Go ahead.

Mr. Gentner: Mr. Wagner, however, your contract with Goerig was already signed before our contract to rent the machinery and equipment was signed, so you cannot say it bears upon or covers the set-up in connection with any dealings of the Kuckenberg Company, can you?

The Court: All right, gentlemen.

Mr. Gentner: Mr. Wagner, you have a computation there that you were going to submit?

Mr. Wagner: Yes.

Mr. Gentner: While this matter is postponed, we might look this over, and perhaps we might agree on that figure, somehow or other.

Mr. Wagner: Very well.

Mr. Gentner: There is one other point, of course. In combining these cases, there may be some question of limitations raised, and we want it understood our rights in that regard will be protected in connection with the combining of the cases. There is a one-year statute of limitations on these suits.

The Court: I wouldn't think you would lose anything or gain anything by the consolidation. You do not have to consent to the consolidation. I am authorized under the rules [18] to consolidate on my own motion.

Mr. Gentner: Very well.

The Court: To make your record better, you do not need to get in the position of consenting.

Mr. Gentner: Very well.

(Thereupon, the proceedings had in the above entitled cause on, to wit, March 13, 1944, were concluded.) [19]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, Ira G. Holcomb, hereby certify that on, to wit, March 13, 1944, I reported in shorthand the proceedings of the pre-trial conference had in the above entitled cause and Court; that I thereafter caused my said shorthand notes to be reduced to typewriting; and that the foregoing transcript, consisting of pages 1 to 19, both inclusive, constitutes a true, full and accurate transcript of my said shorthand notes, so taken by me as aforesaid, and of the whole thereof.

Dated at Portland, Oregon this 17th day of April, 1944.

IRA G. HOLCOMB
Court Reporter.

[Endorsed]: Filed March 23, 1945. [20]

[Title of District Court and Cause.]

Portland, Oregon, Monday, May 22, 1944
3:40 o'clock P. M.

Before: Honorable Claude McColloch, Judge.

FURTHER PROCEEDINGS OF PRE-TRIAL
CONFERENCE

The Court: While you are in the courtroom, Mr. Reilly, Mr. Gentner and Mr. Wagner, in view of the seriousness with which I [21] regard the question I have raised I don't feel like attempting the trial of OPA cases unless juries have been demanded. Mr. Gentner's case is set for trial when I get back from Medford, as I remember it.

Mr. Gentner: June 6th, your Honor.

The Court: I purposely set it for pre-trial ahead of my going away so that you would have as much threshed out as we could. Frankly I have anticipated difficulties with the OPA cases ever since I heard the first one about a year ago now, I guess, and I have approached them cautiously, and I think everyone on the bench has done the same thing. I am going ahead and complete the trial in all issues on the plaintiff's case tomorrow in order to get through, because we can reserve certain questions where a jury is not present, whereas with the presence of a jury they demand immediate decision. So I am going to want the benefit of everybody's research and have an argument about jurisdictional and other questions, but I am not willing to go into the trial of the Kuckenbergs cases in view of what

has occurred today, in the presence of a jury. In short, I am not going to be ready to decide some of these things then. I know you will not have completed your case previous to that time.

Mr. Reilly: Probably not, your Honor.

The Court: No. And when you go down to your office I want you to get word to your friend, Mr. McCutchan, who was [22] to try the case at Medford, and give him a summary of what has happened here. For the same reason that case goes off down there next Monday, and ask him to send word to Mr. Newbury, will you please.

Mr. Wagner: Very well, your Honor.

The Court: We will go ahead this afternoon so our time is not wasted; I mean yours rather than mine.

Mr. Wagner: Your Honor will recall that originally there were two proceedings involving Kuckenberg transactions. One was a discovery proceeding and the other was one in connection with furnishing of construction and road maintenance equipment to the Goerig Construction Company in the construction of an airport up near Bremerton, Washington, and then during the discovery proceedings there became disclosed various excessive charges involving furnishing of similar equipment in a similar manner to the Buckler Construction Company, resulting in contended excessive charges in the sum of \$1,182.50. A third and further operation was——

Mr. Gentner: How much did you say, Mr. Wagner?

Mr. Wagner: I have the figure \$1,182.50. Is that correct? That may be subject to——

Mr. Gentner: Is that your present figure? You see, your first case was, I think, around eighteen hundred, wasn't it? It was on Buckler.

Mr. Wagner: Yes. Well, that is the figure I think at this [23] time.

Mr. Gentner: Eleven eighty-two?

Mr. Wagner: Eleven eighty-two fifty. Goerig transaction \$18,882.42; and Lease & Leigland, still a third purchaser, excessive charges amounting to \$615.19.

Now it is the position of the plaintiff in this case, your Honor—and the prices here are covered by Maximum Price Regulation No. 134—it is the position of the plaintiff that, although the defendant filed certain rates with the Washington office of the Office of Price Administration that he asserted to be his rates in effect during the year 1942, he nevertheless had an established rate during the month of March, 1942, that was then in effect; that the rates that the defendant filed were different and other than those which he had in effect; and in support of those rates that we maintain the defendant had in effect we wish to offer a contract between the Kaiser Company, Inc., and Kuckenberg Construction Company, I believe dated during the month of January—dated the ninth day of February, 1942—providing for the furnishing of various types of equipment by Kuckenberg Construction Company to the Kaiser Company on a fully operated basis and at named rates. The contract

has supplements to it, one dated March 18th, another one September 2nd, change order dated July 3rd, 1942, all of which we are offering as the first exhibit. [24]

Mr. Gentner: These change orders were not different from the original, were they, Mr. Wagner?

Mr. Wagner: I believe not.

Mr. Gentner: They just add further equipment at the same rates?

Mr. Wagner: That is right; further equipment.

Mr. Gentner: At the same rates?

Mr. Wagner: Yes. I was particularly interested in the things that were covered by the contract in effect during March of '38.

Mr. Gentner: I mean, was there a different rate fixed on these change orders than in the original?

Mr. Wagner: No, I don't think so. I think it covers substitution of various equipment possibly where repairs were necessary and the addition of certain equipment.

Mr. Gentner: A different type of equipment?

Mr. Wagner: No, I don't believe so. That is not my recollection.

Mr. Gentner: We won't ask you to prove this. May I just look at this a little bit while you go ahead. We won't ask you to prove this. We entered into this contract all right.

(The contract between Kaiser Company, Inc., "Contractor," and Kuckenberg Construction Co., "Subcontractor," etc., so offered, was marked Plaintiff's Pre-Trial Exhibit 1.) [25]

Mr. Wagner: May I have this marked 2. You want to take a look at this Plaintiff's Pre-Trial 2? It is a certified copy of payment voucher dated April 18, 1942, payable to Kuckenberg Construction Company, the amount indicated being \$16,098.02, being payments of Progress estimate No. 2 on sub-contract No. 3 for period March 1st, '42, to March 31, '42, the certification being made by Asa N. Ward, Resident Auditor of the Maritime Commission. Attached to this payment voucher are progress estimates indicated in the payment voucher.

Mr. Gentner: We will admit that this voucher—I guess that is all right, isn't it? Of course, Mr. Wagner, we don't admit the relevancy of either the contract or of the payment voucher, or anything in connection with the Kaiser contract. I want that understood.

Mr. Wagner: Well, this offer is our offer in the establishment of base period rates.

The Court: It will be marked for identification.

(The certified copy of payment voucher dated April 18, 1942, payable to Kuckenberg Construction Company, with papers attached, so offered, was marked Plaintiff's Pre-Trial Exhibit 2.)

Mr. Wagner: Now do you have available your application or your submission of rates to the Washington office?

Mr. Gentner: Yes, sir.

Mr. Wagner: The letter from the Washington office? [26]

Mr. Gentner: Yes.

Mr. Wagner: We would also like to introduce those.

Mr. Gentner: There they are.

Mr. Wagner: Have this marked Plaintiff's 3. It is letter of January 5th, '43, from Kuckenberg Construction Company to the Washington office of Price Administration.

(The copy of letter dated January 5, 1943, Kuckenberg Construction Company to Construction and Road Maintenance Equipment Board, Office of Price Administration, Washington, D. C., so offered, was marked Plaintiff's Pre-Trial Exhibit 3.)

Mr. Wagner: Plaintiff's 4 is the reply of the Washington office of Price Administration to the Kuckenberg Construction Company in connection with the rates.

(The letter so offered, dated February 5, 1943, Walter Shoemaker, Head Construction and Extraction Equipment Section, Machinery Branch, Office of Price Administration, was marked Plaintiff's Pre-Trial Exhibit 4.)

Mr. Wagner: In this case, your Honor, we have, I believe, agreed to stipulate at this time that certain transcriptions also in this case were taken from the records of the Goerig Construction Company involving rates that were charged. There is some question as to the extent and the amount of payment by the Goerig company [27] to the Kuckenberg Construction Company.

Mr. Gentner: I think we can agree on that, Mr. Wagner.

Mr. Wagner: I don't recall the amount. That is why——

Mr. Gentner: I have the amount. \$94,501.80 is what we received.

Mr. Wagner: We will offer as our next offer this transcription of rates. Do you want to look at it?

Mr. Gentner: That is the same as you gave me?

Mr. Wagner: Yes.

Mr. Gentner: We agree that that specifies the hours correctly and the type of equipment used, if that is the one that we got.

(The statement so offered, consisting of three sheets, the first of which being headed, "Kuckenberg Rentals to A. J. Goerig Const. Co. March 10, 1944," was marked Plaintiff's Pre-Trial Exhibit 5.)

Mr. Wagner: The next offer is the same concerning rates charged by Kuckenberg to George H. Buckler Corporation, I believe, or is that just George H. Buckler?

Mr. Gentner: There are a series of companies. There are four or five I think various companies.

(The statement so offered, consisting of two sheets, the first headed, "Kuckenberg Rentals to Buckler Company, etc. Andrew Lee Rapp 3-16-44," was [28] marked Plaintiff's Pre-Trial Exhibit 6.)

The Court: Let me be clear. Is there just one

case now in which all the claims have been consolidated?

Mr. Wagner: That is right, your Honor. They have all been consolidated. In one case the original application for an order for the production of the records has been dismissed.

The Court: Well then, after that there was reference, when you were getting ready for trial at one time, to another claim that was going to be made and the complaint as to that had not been filed yet you said.

Mr. Wagner: That is right. I included it in the amended complaint in the present proceeding. There are all in all three different companies or purchasers concerned here.

No. 7 is a transcription of transactions between Kuckenberg Construction Company and Lease & Leigland.

(The statement so offered, consisting of two sheets, the first headed, "Kuckenberg Rentals to Lease & Leighland. Andrew Lee Rapp, March 20, 1944," was thereupon marked Plaintiff's Pre-Trial Exhibit 7.)

Mr. Wagner: Your Honor, my recollection is that on previous occasions we furnished your file with copies of the applicable regulations in this matter. I am not quite sure about that. The provisions of the regulations upon which the plaintiff is relying are Maximum Price Regulation No. 134.

[29]

The Court: Now you can ask me about the

regulations and I can answer you as to what you gave me.

Mr. Wagner: Amendment No. 3.

The Court: I have it.

Mr. Wagner: Section 1399.6 on page 3.

The Court: I have ahead of that 1399.1.

Mr. Wagner: That is right.

The Court: Then I have 1399.6 (a).

Mr. Wagner: That is right.

The Court: What else?

Mr. Wagner: Possibly 1399.7, on page 4. Point 1 and point 6 are the two that we principally rely upon. And I believe, your Honor, that is the plaintiff's evidence and plaintiff's case, with the exception of the two matters which Mr. Gentner has indicated, one being a matter of payment in connection with the Goerig Company transactions which I believe he has records pertaining to, and the other issue being in connection with the extent of extraordinary wear and tear which the defense has not pleaded but which we believe will be a matter at issue here. We have indicated previously on pre-trial that we had no objection to their making a showing of unusual circumstances that would warrant an allowance to them, but we have no such evidence within our own files or at our command. It is entirely within——

The Court: I am not clear what issue that would make for a [30] jury. You had better explain your side of that to me first, this wear and tear question. You have been suing here fore treble damages, as I understand, for charges above

your standard stock charges at the control date. Now at this later stage of the case you say that because of unusual wear and tear by the lessee——

Mr. Gentner: By the lessee. Yes, your Honor.

The Court: ——by the lessee that you are entitled to charge more than OPA says was the base rate. Now just what kind of an issue would that make? Would that make a flexible rate for the jury, and if they found that they could lower the amount of the Government's claim, or would that throw the Government's claim out altogether?

Mr. Wagner: It would be in mitigation of the Government's claim, your Honor. It would be——

The Court: In other words—may I interrupt again—that would be an alternative position, a position taken in the alternative by the defendants, that the base rate was not as claimed by you, Mr. Wagner, but was higher when wear and tear was taken into account?

Mr. Wagner: No. We do not believe that it will have any bearing on the base rate but it has been asserted in our previous pre-trial hearing that there were extraordinary and unusual circumstances that caused the breakage and very unusual wear and tear in connection with the operation of this equipment, [31] and just exactly what position the defendant wishes to take along those lines I don't know but it is one of the matters that is at issue and may result in a difference, in at least an offset in connection with the amount claimed due by the Government by virtue of the rates.

The Court: Do you want to discuss that first?

Would it be handy to discuss that first, Mr. Gentner?

Mr. Gentner: Yes, your Honor. Mr. Wagner, you were not insisting upon the pleadings setting forth the position that we are entitled to deduct the amount of unusual wear and tear that was added on, are you? You are satisfied that that issue can be determined under the pleadings as they are, I assume?

Mr. Wagner: Well, I have no objection to your making a showing, and if it is necessary——

The Court: It will be included in the pre-trial order.

Mr. Wagner: Yes.

The Court: As one of the defendants' contentions, you see.

Mr. Gentner: Yes.

The Court: Then it would be a good idea in this case, since you speak about the pleadings, to put it in. The pleading should be amended in accordance with the foregoing.

Mr. Wagner: Yes. That is right, I think, your Honor.

The Court: A catchall.

Mr. Gentner: Very well, your Honor. It is the contention [32] of the defendants that when this equipment was originally rented to Goerig, A. J. Goerig, an individual up here at Bremerton, the conditions of the job and of the soil and surrounding the rental were misrepresented to Kuckenberg Construction Company, and that if the conditions had been properly represented and the true condi-

tions had been divulged at the time this equipment was undertaken to be rented, that the equipment never would have been rented at all, as the job was not a proper one for this type of equipment.

In connection with that, what we would show is that this job was one where the use of a shovel and trucks was proper but not the use of tractors and scrapers or graders, as were rented, and the work had to be carried out by excavating circular revetments in the side of hills and that necessitated the use of these scrapers on a circular basis for which they are not constructed. They are constructed for a straight pull ahead, and the use of these graders and equipment on a circular basis just tended to ruin them. The big tires that are on these scrapers or carryalls received side thrusts of rocks and destroyed them, and also the entire equipment was just racked to pieces by the method of use.

(At this point the gentleman sitting next to Mr. Gentner spoke to him in an undertone.)

Mr. Gentner: In the loading of them, yes. And as soon as this condition was discovered the Kuckenberg Company shut the [33] job down and refused to proceed, whereupon Mr. Goerig came to Portland and had a consultation with the Kuckenberg people here and pleaded with them to leave the equipment on the job and they would pay them for the excessive and unusual wear and tear that would result from permitting the equipment to be left there.

Our evidence will further show that at that time the price regulation was very new and what people were to do was very uncertain and that Mr. Kuckenberg consulted the local office of the OPA here as to what his procedure should be and was advised that it would be a matter of agreement with the lessee and that an agreement should be entered into with the lessee, and we will show that the Washington office of the OPA had placed in the hands of the local office here a series of fifty questions and answers for the guidance of persons inquiring, and in these questions and answers it was indicated that the matter of unusual wear and tear was a matter of agreement between the parties. Consequently an agreement was reached whereby the sum of \$2.00 per hour—I might say, first, the Kuckenberg Construction Company agreed to let Goerig just pay for whatever the actual extra wear and tear would be but he rather desired to have it on a basis of a certain amount per hour, and a new contract was entered into then setting forth an additional price of \$2.00 per hour for this unusual wear and tear.

Now our position is that we are entitled to this additional \$2.00 and we are prepared to show our actual expenditures in connection with unusual wear and tear, if that is the [34] basis upon which the OPA wants to have us proceed.

Now it is understood, is it, Mr. Wagner, that your position is that whatever actual expenditures we may show by way of unusual wear and tear in connection with this contract would be properly

deductible from the amount that we charged under this \$2.00 per hour? Is that your position?

Mr. Wagner: Well, I think that, of course, any showing that you might want to make would be in mitigation of the Government's claim for damages.

The Court: What is your claim in dollars?

Mr. Wagner: Sixty——

The Court: Just give me round figures.

Mr. Wagner: About three time \$20,000.00. About sixty-two thousand.

The Court: You claim they overcharged twenty thousand on the base rate. Deducted from the twenty thousand is this extra charge of \$2.00 per hour?

Mr. Gentner: That results in 13,800 odd hours.

Mr. Wagner: Just a minute. That is not exactly our position. They indicated that \$2.00 an hour was the amount that was agreed upon as covering extraordinary wear and tear. We do not concede that that is an appropriate charge or that that rate was ever approved. We are willing to concede that if there was breakage or if there was accidental mishaps that caused extraordinary expenditures on the equipment, or if there was such circumstance prevalent there that extraordinarily short hours were sufficient to wear out a piece of machinery, that that can be shown, and if shown to be relevant, of course, to the job, why it could be used to offset.

The Court: When did you first hear of this, Mr. Wagner?

Mr. Wagner: When did I first hear of what?

The Court: This charge for extraordinary wear and tear. Was it in the file brought to your attention before you brought the suit, or have you heard it only since you have gotten in these hearings?

Mr. Wagner: It was called to my attention—my recollection is it was called to my attention prior to the institution of the proceedings, at least the latter one. I am not sure exactly when it did come into the picture.

The Court: If you had the figure available to you shouldn't you have reduced your claim by that amount at that time?

Mr. Wagner: Yes, but we had no figures available. And then, your Honor, there is a question of fact as to what the extent of this extraordinary wear and tear is.

The Court: Yes. But I said if you had a figure available to you—if you had a figure that you could have relied on—I take it you would have reduced your claim by that amount at that time.

Mr. Wagner: Yes, your Honor.

The Court: All right. Now you say at the \$2.00 an hour it [36] figures up thirteen thousand dollars?

Mr. Gentner: Thirteen thousand eight hundred I believe is what the charge was.

The Court: At \$2.00 an hour?

Mr. Gentner: \$2.00 an hour; yes, sir.

The Court: And you have your data here to show what the cost of repair or replacement was on account of extra wear and tear?

Mr. Gentner: Your Honor, in order to prove that I have here all of our entire expenditures on this job. The only way I can prove it is to bring our records up here showing what we paid out, both at Bremerton and Portland.

The Court: Settlement has been made between the parties?

Mr. Gentner: Well, we billed them for a hundred thousand dollars and a few thousand over, and he paid \$94,501.80 and then refused to pay the remaining five thousand odd dollars, which he still refuses to pay; so that we have received \$94,501.80, though we billed them for one hundred thousand.

The Court: Yes.

Mr. Gentner: One of the questions I think possibly that might arise here is which figure is to be taken, whether the amount we actually received or the amount that we billed.

The Court: The Government's position has been, I believe, it is the amount that you charged them.

Mr. Gentner: Yes, that has been their position. And one [37] reason for asking for these documents in the subpoena was that the Government had taken the position in the Oregon Transfer case that it was the amount that was paid, not the amount that was billed. In the Oregon Transfer case they had billed for, oh, more than \$20,000.00 in excess of the rate that was allowed and settlement was permitted to be made on that basis, whereas here we are being held by the amount of the charge and not by the amount that we actually received.

But, going further, I might ask, it would be conceded, would it not, Mr. Wagner, in this case there was no specific direction from the Administrator directing the institution of the action for treble damages in this case?

Mr. Wagner: Well, I think that you are going now to the question that the Court raised.

Mr. Gentner: Yes.

Mr. Wagner: I think that those matters can be disposed of in the matter that is already before the Court, and of course I will interpose the same objection, that it is impertinent and it is irrelevant here, and, therefore, I ask the Court to rule similarly as was ruled in the other case this morning.

Mr. Gentner: What I was getting at was the question of fact as to whether or not any specific order or direction had been given by the Administrator as to this particular case?

Mr. Wagner: On the bringing of the action?

Mr. Gentner: Specifically? [38]

Mr. Wagner: The same objection.

Mr. Gentner: No. As a matter of fact, did the Administrator specifically authorize the bringing of this case?

Mr. Wagner: Well, that depends upon what you might feel was the authority of the Administrator. I mentioned in the previous case, Mr. Gentner—

Mr. Gentner: I don't mean by delegation, but I meant by direct order by the Administrator to file suit against the Kuckenberg Construction Company for treble damages. Is there such authority?

Mr. Wagner: I will go through the file and see if there is such authority.

Mr. Gentner: You would know, wouldn't you?

Mr. Wagner: I will go through the files and see if there is such direction and let you know.

Mr. Gentner: You don't know?

Mr. Wagner: I don't know offhand, no. It is very difficult to remember a great many things, Mr. Gentner. I just don't know but I will ascertain it.

The Court: You were able to make a positive statement in the other case.

Mr. Wagner: Yes, that is right.

Mr. Gentner: I was wondering why you can't make such a statement here.

The Court: You don't recall? [39]

Mr. Wagner: No, I don't. There has been a great deal of correspondence back and forth in connection with these cases.

Mr. Gentner: Now similarly I would like to know whether there was any direct order by your District Administrator directing the filing of this case.

Mr. Wagner: I don't recall. I recall none. The same objection, however.

Mr. Gentner: Well, continuing, your Honor, I have here——

The Court: Well, here, you don't want to make an admission broader than the fact, or than you need to. I am pretty sure I am going to disagree with you—if you hold the view that the legal staff can begin one of these cases without direction from anybody, I am pretty sure I am going to disagree with you on that. Now then, I don't want you to

make an admission, the full import of which you don't realize, without explanation of what you have just said, which might be taken to mean that this case was brought by the legal staff, if not by direction from the Administrator, which you are going to look up, if not by direction from him without direction by—what is the title of the man here in Oregon?

Mr. Wagner: Director.

The Court: The director for Oregon?

Mr. Wagner: District Director for the District of Oregon.

The Court: District Director—just put it in the record here, just his full exact title. [40]

Mr. Wagner: District Director for the District of Oregon.

The Court: Of OPA.

Mr. Wagner: Office of Price Administration.

Mr. Gentner: It was Mr. Montgomery at that time.

The Court: District Director of the Office of Price Administration for the District of Oregon.

Mr. Wagner: That is right.

The Court: I don't think you intended to say that Mr. Montgomery did not know of the bringing of these cases and authorized them to be brought—this particular case, the Kuckenberg case? We just have the one case now.

Mr. Wagner: No, I don't believe I said that. I said I did not recall or remember what exactly was in the file in connection with the bringing of the action.

The Court: Yes.

Mr. Wagner: But I will ascertain that, or will do so now.

The Court: Yes.

Mr. Wagner: If the Court would desire it. It may take quite some time.

The Court: No. You take your time about it because you will have two questions there I would like to have you answer on the record: One, what direction, if any, was given by the Administrator to bring these cases, now one case? Two, what direction, if any, was given by the District Director for bringing these cases, now one case? And you take your time in checking your files and your [41] other available information before you answer on the record either of those questions. Your daily contact here with the District Director may provide you the answer as to him. I don't know that I would hold, like you do in some Government cases, that everything had to be in writing, if you were able to tell us that Mr. Montgomery, who was then District Director, knew of these cases and approved of their being brought. You see, a funny thing happened here due to a change in our procedure. I don't just remember how Government pleadings were signed or verified, or whether they were not. From where I sit you get out of the habit of looking closely at things like that. But if prior to the adoption of our New Rules of Civil Procedure—they are no longer new—pleadings were signed and verified, or either one, when they were brought in behalf of

the Government, you would have somebody's name on these complaints.

Mr. Wagner: That is true.

The Court: Nowadays you would have Mr. Bowles' name on there, you would have Mr. Montgomery's name on there, or Mr. Brown's now, but our rules permit an action to be started by the filing of a complaint signed only by the attorneys, who warrant themselves by signing the paper to be duly authorized to proceed.

Now then, that means, without any embarrassment being [42] intended at all, when a question like this comes up they have to tell us who it was told them to file these cases, and the papers don't bear a verification any more. If you just think about it a minute that change in the rules is because of the high respect which is accorded to the bar, that when they put their names on a paper they are acting with authority.

Now we know if the Administrator, who is resident away from here, gave you any authority in the case it would be in writing and that would be found in the file, but you might be able to say, you might want to say as to the District Director that that was a matter of oral discussion and knowledge. Just take your time about that, Mr. Wagner—both of those things.

Mr. Wagner: Yes. I just recall that not so long ago a similar question came up in the state court, in which I was counsel, and had as counsel verified the pleadings. It so happened that in the verification no statement was included to the effect that the

plaintiff was not residing—not within the State of Oregon. But in that situation, as a matter of fact, the facts concerning the litigation were peculiarly within my own knowledge. That would be an analagous situation here, I think, where the Administrator is not a resident of the State of Oregon but the facts being particularly within the knowledge of the counsel representing the Administrator I think if a similar pro- [43] vision had been made for the verification of these pleadings, that it would be very close and very analagous to that situation.

The Court: Well, except one thing. I want you to take away from here one thing—and you will be helped by looking over the question of law very exhaustively and studying your authority to represent the Government—suing for the United Staes, whether directly or indirectly, is a different proposition than suing for claimants who are private individuals, I think. Now go ahead, Mr. Gentner.

Mr. Gentner: It is understood then, Mr. Wagner, that whatever amount our proof would show was due to unusual wear and tear you are prepared to concede would be a proper deduction from the amount you are claiming here on account of this \$2.00 an hour extra? Do I get this clear, or are we in accord on that?

Mr. Wagner: It would seem to me, Mr. Gentner, that the appropriate thing to do would be to make an offer of proof of the extraordinary expenditures and prove that they were extraordinary expenditures.

Mr. Gentner: Well, yes, but granting that, I mean as legal proposition.

Mr. Wagner: And then the matter can be determined upon the submission of the proof.

Mr. Gentner: I mean, but assuming that we do prove that, if [44] we do prove that, as a legal proposition you are prepared to say that that would be a proper deduction?

Mr. Wagner: Yes.

Mr. Gentner: All right. That is fine. Your Honor, the only way we have, as I say, of establishing that is by putting in our total payrolls. You see they are all in one—our total payrolls for labor, both at Bremerton and at Portland, and our total expenditures for repair parts. Our records were not segregated, not anticipating any necessity of segregating unusual wear and tear. Our records are all combined, showing all of our expenditures on this job, which total \$90,853.23, and from that we are segregating the labor and parts that were expended for these unusual repairs, amounting to some \$33,552.00. I might say we actually spent within a little over \$3,000.00 of the amount we took in on this job.

Now I have here all of our payrolls.

The Court: Well, you won't want to leave them here.

Mr. Gentner: No.

The Court: We won't get to try this case for quite a while.

Mr. Gentner: I have a summary here.

The Court: That is a good idea. Leave that with Mr. Wagner for his information.

Mr. Gentner: I will give you a copy of the original summary here.

The Court: Just put it in for the time being as a provisional [45] exhibit here, to be supplemented later by the originals if and when we go to trial.

Mr. Gentner: Here is the original of the Portland payrolls.

Mr. Wagner: For the purpose of the record, why the Administrator is objecting at this time to the summary upon the ground and for the reason that there is nothing in here to show that these are expenditures for overtime.

The Court: I will save you a little time. You won't need to state any objections now. All that is being done now is to state your position and to identify documents, and the right to make objections is reserved to both sides until the time of the trial.

Mr. Wagner: That is fine then. That is what I want to do.

The Court: This is just for enlightenment. Mr. Gentner is figuring on working you out of Court, you see, by establishing there were no overcharges in this case.

Mr. Wagner: Yes.

Mr. Gentner: Then I have a summary of all of our invoices that are shown here. I have invoices covering all expenditures on the job of hauling. These are the summaries we have, which we would have to support by the production of these invoices.

I might say, your Honor, that apparently there is one defense we have here. It is the question of immunity. It has been raised here as an affirmative defense, and I have here and [46] present the written statements covering those obligations. I think you have the originals of those, don't you, Mr. Wagner? They were submitted to you.

Mr. Wagner: Yes. I think the record can show that the claim of the constitutional privilege against self incrimination has been consistently made by the defendant in connection with all the matters, with the exception of the Goerig Construction transaction and the records involved there. No claim was made on the grounds at any time, on those grounds in connection with that matter of those transactions.

Mr. Gentner: You mean you didn't take any documents? Is that what you mean?

Mr. Wagner: That is right.

Mr. Gentner: Now, if the Court please, I would like to make a statement. The question of Kuckenberg Construction Company not socalled cooperating with the OPA has been raised repeatedly here and apparently is the basis, as near as I can gather, for the prosecution here and the sentiment otherwise.

Mr. Wagner: I want to take exception to that statement, your Honor. I don't think any statement was ever made——

The Court: I made it, didn't I?

Mr. Gentner: I think the Court made it.

The Court: Didn't I? That is the impression I got.

Mr. Gentner: I got the same impression, your Honor. [47]

Mr. Wagner: But the Court stated it was an impression.

The Court: Thank you.

Mr. Gentner: I got the same idea, and I feel in all fairness I should at least make a statement as to why our position is taken. We stood on our rights there and undoubtedly it was a mistaken idea that I had at the time but when the attempt was made to get the remaining money from Mr. Goerig I was met with a refusal by his attorney, Mr. Middleton, who informed me that he was associated with Mr. MacCormac Snow, former Chief Enforcement Attorney for the OPA, who was now representing Mr. Goerig, and that Mr. Snow was now representing Mr. Goerig, and based on that they were refusing to pay the balance of this money, something over \$5,000.00 and that was followed very shortly by these proceedings in the OPA, and while I say I didn't know Mr. Wagner during the time, during the procedure of this litigation I came to know him quite well and I think if I had known him then I would have felt a little differently but at the time from the fact that Mr. Wagner had been a former office associate of Mr. Snow it occurred to me at the time and I felt it would be unwise—

Mr. Wagner: Let me correct you there, too. I never have been an office associate of Mr. Snow until, may I say, Mr. Snow's resignation from the OPA, at which time he occupied the office that I

formerly occupied. Other than that, there has been no association. [48]

Mr. Gentner: I had a deal to close over at Mr. Snow's office and I saw your name on the door.

Mr. Wagner: That is true. I still have mail coming over there.

Mr. Gentner: So I didn't feel inclined to—it just seemed to dovetail with me at that time. But, as I say, during the time since then I have spoken to Mr. Wagner and he has been very fine in all respects and very agreeable and I probably would have felt a little differently if I had known him a little better at that time. I think that explains why we refused to turn over records at that time. It was for no other reasons. It seemed to just dovetail in. And Mr. Wagner stated this morning—of course it wasn't our case but I was here and heard it—that we had refused to settle. On the contrary, I think our evidence will show that very recently here Mr. Kuckenberg offered if any basis could be arrived at to pay back any amount that the OPA would say was improperly charged and that was refused, and then an offer was made to pay to the OPA such amount and that offer was refused, and I asked upon what basis the matter could be settled and Mr. Wagner was——

Mr. Wagner: Well, just a minute, Mr. Gentner. I don't appreciate this going into a long discourse for the Court over proposals and counter-proposals for settling the Administrator's claim. I don't think it is relevant and I don't think it has [49] any place in here either at pre-trial or trial.

The Court: It might have some, because I take the view that wilfulness is an element of the offense. I don't know about that. I have an open mind about that yet.

Mr. Wagner: I appreciate that, your Honor. I would like to have an objection to the statement of counsel made a matter of record.

Mr. Gentner: And while, as I say, Mr. Wagner was friendly and a very fine person, yet he was adamant in insisting that treble damages to the OPA would be the only basis he would consider, if we wanted to pay treble damages to the OPA for the amount they felt was due; otherwise that would be the only basis, and our offer to do as was done in the Oregon Transfer case was refused.

We also left with Mr. Wagner for weeks our summary of records in the Goerig case and they had full facilities for seeing our position in that matter.

So that, as I say, as soon as I got to know Mr. Wagner a little better I came up and offered to do anything that they wished and return whatever they felt was overcharged, although, as I say, we consistently felt as far as we could find there was no overcharge but, in fact, an undercharge.

Our position then is that there was not any established charge in effect on March 31, 1942, by virtue of the Kaiser con- [50] tract; that that contract apparently is for a fully operated rate, and that there is no provision in the regulation for the establishment of a fully operated rate as of March 31, 1942.

Now I not only believe that to be true from a reading of the regulation itself but I have the authority of the OPA itself in numerous of these laws by letters that they have sent from Washington, whereby they have denied the existence, the possibility of the existence of any such a rate. Now in the letter to Kuckenberg Construction Company, for one, they have done so, and I have here numerous other letters likewise denying the existence of any such a rate as of March 31, 1942, for a fully operated rate.

The position of the OPA at Washington has been that there must have been a rental on the bare basis and the fully operated basis before an established charge in fact would come into effect as to operating and maintenance services. There is only provision in the regulated services for the establishment of "established charge in effect" upon the operating and maintenance services; not under "fully operated"—under Amendment No. 3, which was in existence at the time this rental took place. Since then there has been adopted Amendment 9, which provides for the establishment of "fully operated" rates upon application to Washington, D. C., and which has been done by Kuckenberg Construction Company and a fully operated rate allowed. Prior to that time unless there was a rental on a bare [51] basis and a fully operated basis it was impossible to have an established charge in effect. And, furthermore, this Kaiser contract was entered into in February, 1942, and the regulation defines an established charge in effect as meaning one pro-

vided in published service charge sheets or a charge regularly quoted. The Kaiser contract was entered into in February, 1942, and continued during its life there, during the life of that work. Subsequent to that time there was an increase in the price of wages here in the Portland area on March 25th, so that the price which was quoted in February was not a quoted price on March 31st, and the existence of a contract in February would not establish an established charge in effect on March 31st at a later date, even though the contract continued over that period of time. That is one point here.

We also have the rate that was established by the OPA Washington, D. C., under Section 1399.6, subsection (2) (b), which is the letter that Mr. Wagner offered here of February 5th, 1943, from the Washington office of the OPA, and that was in response to letter of Kuckenberg Construction Company. In that letter the Washington office held that there could be no fully operated rate and fixed a rate at that time for operated and maintenance services.

Now then, I also have here further letter from OPA, Washington, D. C., to another contractor, wherein the OPA at [52] Washington has taken the position that such a rate when allowed is retroactive and covers all contracts entered into subsequent to October 22, 1942, I think when Amendment No. 3 became applicable, and consequently it is our contention that in the absence of any evidence of the establishment of a charge for an operated and maintenance service, that there was no established rate

as of March 31, 1942, and if that was the case then the letter of February 5th, 1943, became applicable to our case.

We will be prepared to show, I believe, that there was a quotation of rates for operating and maintenance services in Spokane and also in Portland as of March 31st, 1942, at a higher rate than was allowed by this letter of February 5th, 1943, and it will be a question of fact whether or not we had an established charge in effect as of March 31st, 1942, at a higher rate in Spokane, and also in Portland, or whether or not the letter of February 5th, 1943, would prevail to establish our rates.

I have here prepared and will submit computations of all of those cases showing the billings by Kuckenberg Construction Company on all of the jobs in question, and then a comparable billing on the rates allowed under this letter of February 5th, 1943, which show that we are under to the extent of \$6,000.00 on the Goerig job as to billings and \$12,000.00 as to money received. I think that even allows the \$2.00 for— [53] no, I guess not. No; that is excluding the \$2.00 for unusual wear and tear, which is a separate factor.

Now then, these computations also show on the Buckler cases that we are under to the extent of \$1800.00, according to the February 5th letter on the Buckler cases, and under on all the others. So that on the basis of the authorization from Washington, D. C., we are under on all the cases which are up before the Court.

We have a further contention here that the--- well, I may say that there may be some confusion, that the machines should be considered seperately instead of the aggregate prices. I might illustrate that in this manner:

In the Buckler case we rented six motor graders and three shovels with the capacity of three quarters of a yard. Now they were all rented at the same price when they were rented by Kuckenberg Construction Company; that is, so much per hour for the time used. Now taking these machines by OPA billings based on the February 5th letter, that would leave in the case of the motor graders three of them that would be under the OPA charge to the extent of about \$1100.00 and three would be over about \$1100.00 and if you took the six together you would be even.

Now on the shovels, if you took the OPA billings with the same price and same machines on the same job, two would be [54] under the OPA maximum and one would be over, but if you took all of the equipment together we are \$1800 under the OPA ceiling price fixed by this letter. That is on the basis of the letter of February 5th.

Now we are prepared to show that this regulation, which I stated the other day to your Honor finishes a method or procedure for the establishment of these rates for operating and maintenance service by the office of the OPA in Washington, D. C., by letters, but the regulation furnishes the basis upon which those rates must be fixed, and there is the requirement in there, the positive re-

quirement in these words: "that it must result in a price bearing a normal relation to the maximum price of the competitive supplier of the same or similar service." I have here——

The Court: Put it in the record right there, the regulation number and the page and so on.

Mr. Gentner: That is 1399.6, subsection (2) (b). That is Maximum Price Regulation 134, Amendment No. 3. I have here, which I am offering, the application of two contractors, which include application for a price for motor graders, and these two graders were used on this same job side by side with those of Kuckenberg at the same time, and they were similar, the only difference being that if anything they were smaller than the Kuckenberg motor graders, and the application was made at approximately the same time. The rate allowed to Kuckenberg [55] was \$3.50 per hour and the rate allowed to the other two was \$4.40 per hour for operating and maintenance service.

Now apparently at one time the OPA at Washington, in one of the letters, stated that the reason for a difference in the rate would be the difference in the method of pricing the service, and I have here this one application where the \$4.40 rate was allowed, where the application listed absolutely identical charges to those given by Kuckenberg Construction Company.

I may say, that as a matter of fact, the two contractors compared their applications and sent them in, and they are identical right down to the last penny, and within a period of a few days the Kuck-

enberg rate came out on February 5th, 1943, and the Porter Yett rate came out on February 23rd, '43. and on identical graders except that Kuckenberg's was bigger. Kuckenberg got a \$3.50 rate and Porter Yett got a \$4.40 rate, and the United Contracting Company also got a \$4.40 rate, and these graders were all used on the same job.

The Court: The applications got in the hands of different clerks.

Mr. Gentner: Well, that is quite likely. Quite likely. Yes, I think that is quite likely; although I think one, maybe both of them, I guess, forgot about ours. That, I say, violates the regulation that I have just quoted to your Honor, in that it does not bear a normal relation to the maximum price of [56] this competitive supplier. If we take the \$4.40 rate, then even going machine by machine there is no overcharge. So that that may have a bearing. I believe also the matter of going machine by machine, as I understand the contention of the OPA it is that he rented six machines and they are all rented at the same price, but you take the OPA method of billing under that three of them resulted in overcharge and three in an undercharge, and they ask you to pay treble damages on the three that have an overcharge but don't give you any credit on the three that have an undercharge.

The Court: Like the income tax—from one year to another.

Mr. Gentner: Now that is another reason why I feel that this Oregon Transfer Company matter

would be pertinent, because under a theory of settlement, as was allowed in that case, that would result in a settlement on a basis of aggregates; that is, not machine by machine but the total charge; because if you have here a charge where the total is under you can always spread it around to the applicable machines, but when you come and say, "No, you must pay on those where you are over and don't get credit for those where you are under," even though the net price to the supplier is less than the OPA allows for the whole equipment you have rented in one contract, why that becomes pertinent and material.

There was a statement this morning by Mr. Wagner that [57] there is a right of appeal from these rates that are allowed by Washington, but I want to call the Court's attention to the fact that there is no right of appeal of any kind from these Washington letters, and therefore it would be a matter within the province of this Court to pass upon the matter whether they are discriminatory or whether they comply with the regulation.

I call your attention very particularly to the provision for appeal, and that is Section 203, I guess it is, 923 under the U. S. Code, that provides for an appeal from a regulation or order under Section 2.

Now Section 2 provides as follows:

"As used in the foregoing provisions of this subsection, the term 'regulation or order' means a regulation or order of general applicability and effect."

Consequently one of these Washington orders that affects only a particular machine of a particular contractor is not meant by this reference. This is neither a regulation nor is it an order within the meaning of the Act.

The other provision for appeal is in the case of a price schedule as specified in Section 206, and in Section 206 we find that the price schedule referred to is one that is required to be published, reprinted in the Federal Register within ten days. It is required to be printed in the Federal Register. Now that means such a price schedule as is a part [58] of this regulation and covers what is known as the bare rental of equipment and has no reference to these letters that come out from Washington, D. C., that fix a price on a particular piece of equipment for a particular contract.

Consequently there is in the Act no provision for any appeal or protest to the Administrator at all of these laws by letter which fix the rate, as they do in this case, of machines side by side, at different amounts and the one who gets the higher rate receives a pat on the back as a patriot and the other is brought into Court here for treble damages.

Now there is a proviso in this same section that provides for these letters from Washington, which says that the contractor or the person who makes the report, after he receives a disapproval of his requested rate, may recompute his proposed charge in accordance with the requirements of this paragraph and the suggestions contained in the disap-

proval and report the same pursuant to sub-paragraph 2. And then the following provision also appears: "That final settlement shall be made in accordance with the action of the Office of Price Administration on such report and if required by the Office of Price Administration refunds shall be made."

I looked this over and I found no provision for a time within which such a recomputation was to be made, and accordingly the Kuckenberg Construction Company sent to the Office [59] of Price Administration a letter—I don't know; it is difficult to read and compute prices where they are put out that way; but, nevertheless, application has been made calling attention to the Office of Price Administration of this discrepancy between the price of \$3.50 and \$4.40, and I think that was on May 5th, and no answer has been received as yet from Washington on that.

Now I wish to offer both these. I sent a follow-up letter in on May 19th calling attention to the fact that they had not answered the letter of May 5th, so I don't know what the answer will be. Do you have copies of these, Mr. Wagner? (Indicating) I presume they have been forwarded to you.

Mr. Wagner: I don't recall ever having seen these before, Mr. Gentner.

The Court: I am going to have him mark these things with you some time later, Mr. Person.

Mr. Gentner: Yes. Do you want to finish this now or at another time?

The Court: I know Mr. Wagner won't want to answer now because you have developed some new things. The only question is, when could you finish without your feelings being hurt?

Mr. Gentner: Well, I suppose I want to take another half hour yet.

The Court: All right. We will do it some other time. [60]

Mr. Gentner: I am sorry, your Honor. There is a vast mass of material here.

The Court: That is all right. I don't always have cases that involve as many questions as these.

Mr. Wagner: In connection, your Honor, with the matter that was raised here earlier, I just wanted to call the Court's attention to Section 201 (a) of the Emergency Price Control Act, wherein it provides that attorneys appointed under this section may appear for and represent the Administrator in any case in court. That was what I had reference to when I mentioned about the authority of the attorneys appointed to appear for the Administrator.

The Court: Now, look here, that is all right. When I practiced law certain men hired me on retainer, just like you are hired, of course, per month. That didn't mean I could go down and start a case for them whenever I heard that somebody had done wrong.

Mr. Wagner: Yes. I understand your Honor's point.

The Court: You see what I mean?

Mr. Wagner: Yes, I understand your Honor's point.

The Court: You have a right to be here if your client has told you to come here.

Mr. Wagner: Yes.

The Court: That is what I want to know, if the man in Washington, the Great White Father, said, "Sue Kuckenbergl out there." [61]

Mr. Gentner: Your Honor, might we have some time limit within which you might produce any authority from Washington?

Mr. Wagner: Well, I imagine your Honor will determine the matter in connection with Mr. Reilly's case.

The Court: Oh, I don't know, but he and I will be talking about it in the Reilly case which begins tomorrow, you see, and in the next day or two. I don't want to interfere with your trial of the Reilly case because it is putting too much on your mind, but you will be able to take a position on it right soon, won't you?

Mr. Wagner: Very soon.

Mr. Gentner: All right. Thank you.

The Court: Yes.

(Thereupon, at 5:15 o'clock P. M., Court was adjourned and the following documents were offered and marked as pre-trial exhibits without the presence of the Court:)

(Statement headed "Cost Summary—A J Goerig Construction Co., Bremerton Airport," was marked Defendants' Pre-Trial Exhibit 8; Statement headed "Portland Payroll Totals

—December 12, 1942, to June 19, 1943," was marked Defendants' Pre-Trial Exhibit 9;

Statement dated April 30, 1943, addressed to A. J. Goerig Construction Company and headed, [62] "Hauling Charges," was marked Defendants' Pre-Trial Exhibit 10;

Statement headed "Summary of Invoices" consisting of three typewritten sheets, was marked Defendants' Pre-Trial Exhibit 11;

Statement dated October 19, 1943, signed Henry A. Kuckenberg and addressed to Prentiss M. Brown, Price Administrator, etc., was marked Defendants' Pre-Trial Exhibit 12;

Statement dated January 6, 1944, signed Harriet A. Kuckenberg and addressed to Chester Bowles, Administrator of the Office of Price Administration, etc., was marked Defendants' Pre-Trial Exhibit 13;

Statement dated January 6, 1944, signed Henry A. Kuckenberg and addressed to Chester Bowles, Administrator of the Office of Price Administration, etc., was marked Defendants' Pre-Trial Exhibit 14.)

(Thereupon, the proceedings had in the above entitled cause on May 22nd, 1944, were concluded.)

[Title of District Court and Cause.]

Portland, Oregon, Monday, June 12, 1944.

10:30 o'clock A. M.

Before: Honorable Claude McColloch, Judge.

FURTHER PROCEEDINGS OF PRE-TRIAL
CONFERENCE

The Court: I am sorry to have been delayed, Mr. Wagner. This is further pre-trial in the Kuckenberg case. [64]

Mr. Gentner: Yes, your Honor. We were right in the middle of it.

The Court: Oh, yes. You were making a statement.

Mr. Gentner: At the time of adjournment.

The Court: Yes. Would you like to go ahead and complete that statement?

Mr. Gentner: Yes, your Honor, I would. I think I will start in and offer some more exhibits and that I can catch up our position. I think I had presented Pre-Trial Exhibits 15 and 16. I think I gave you copies of those, Mr. Wagner, did I not?

Mr. Wagner: I saw these.

Mr. Gentner: We offer those in evidence.

Mr. Wagner: I am going to object to them. Are there any replies to this correspondence?

Mr. Gentner: Yes. I have a letter here which has not been marked. There are two more in this correspondence and I had better have it marked. Here are two more exhibits.

(The correspondence so offered were marked as follows:

Carbon copy of letter dated May 5, 1944, Kuckenberg Construction Co., to Walter Shoemaker, Office of Price Administration, Washington, D. C., was marked Defendants' Pre-Trial Exhibit 15;

Carbon copy of letter dated May 19, 1944, Kuckenberg [65] Construction Co., to Walter Shoemaker, Office of Price Administration, Washington, D. C., was marked Defendants' Pre-Trial Exhibit 16;

Letter dated May 24, 1944, Walter Shoemaker, Head Construction and Extraction Equipment Section, Machinery Branch, to Kuckenberg Construction Company, was marked Defendants' Pre-Trial Exhibit 17; and Carbon copy of letter dated June 1, 1944, Kuckenberg Construction Co., to Walter Shoemaker, Head Construction and Extraction Equipment Section, Machinery Branch, Office of Price Administration, Washington, D. C., was marked Defendants' Pre-Trial Exhibit 18.)

Mr. Gentner: Here is the answer from your office in Washington, Mr. Wagner. I have a further series of letters here bearing upon the same point. That is the correspondence between Porter Yett and the United Contracting Company, with relations to these motor graders, consisting of a letter from Porter Yett to the Office of Price Administration at Washington, D. C., dated February 10, 1943; the answer of the Office of Price Administration to Porter Yett, dated February 23rd; a letter from the

Office of Price Administration to the United Contracting Company dated February 27, 1943; and an answer of United Contracting Company to the [66] Office of Price Administration of Washington, D. C., dated March 9th, 1943; and the reply of the office of Price Administration to the United Contracting Company dated March 31, 1943. These are all photostatic copies of the originals and bear upon the same question.

Mr. Wagner: These all being offered as part of the same thing?

Mr. Gentner: Yes. These all bear on the same question. I had better have these marked for identification, I presume.

Mr. Wagner: What, may I ask, is the purport of all these offers?

Mr. Gentner: This, your Honor, is in line with the proposition that I was discussing at the time that the pre-trial adjourned, and that is the question of price granted to Kuckenberg Construction Company by the Office of Price Administration under the provisions of Section 1399.6 subsection (2) (b) (1). The Office of Price Administration at Washington, D. C., is given the authority to set the price of what is known as operating and maintenance services, being about one-half, you might say, of the rental charge of a piece of equipment. Under this regulation what is known as the bare rental is fixed by the regulation itself, and that appears in the regulation, but the price for what is known as operating and maintenance services, consisting of the services of an operator and the fuel, lubrication,

greas- [67] service, and repairs for the maintenance of the equipment which is necessary in connection with what is known as the fully operated rental, that is fixed by the Office of Price Administration at Washington, D. C., under the terms of the regulation, and I was just in the process of pointing out that the regulation provides that the maximum charge for such a service shall be a charge which is determined upon the basis of labor rates in effect on March 31, material prices in effect on that date, and resulting in a price bearing a normal relation to the maximum price of a competitive supplier of the same or similar service.

Now our point was that the price allowed to Kueckenberg Construction Company in the letter from the Office of Price Administration at Washington, D. C., on February 5th, 1943, did not follow the terms of the regulation in that this office at Washington, D. C., at approximately the same time, had fixed a price of \$4.40 per hour for motor graders operating side by side with the motor graders of Kuckenberg Construction Company on the same identical job, for motor graders which were smaller and less costly to operate and maintain than the motor graders of Kuckenberg Construction Company, which was allowed a price of ninety cents per hours less upon the same identical filing of cost data, and that, our contention is, constitutes a violation of the regulation and arbitrary discrimination and violation of both the Act and the regulation, and that the [68] fixing of this price in that

manner did not conform to the regulation itself but constituted discrimination and arbitrary taking of property without due process, which is a point that I think can be raised in connection with this particular phase of the proceeding.

It is true, of course, that the Act itself is not subject to attack in this Court, but we are not attacking the Act. In fact, we are conforming to the Act and the regulation and the point we are raising is that the action of the Office of Price Administration is not in accord with its own regulation.

Now these letters are the applications of these two operators of motor graders that were operating on the same identical job, side by side, with similar equipment, as I say, somewhat smaller, and, therefore, as I say, less costly to operate and maintain, and the answers of the Office of Price Administration fixing these higher rates during the same months and the same year that the price was fixed for Kuckenberg Construction Company.

There are also copies of letters to the Office of Price Administration calling their attention to this fact here in May of this year, and a reply from the Office of Price Administration at Washington, D. C., admitting the fixing of the higher rate, and at this late date, now some sixteen months [69] later, the Office of Price Administration now states that the price which it fixed in February, 1943, for these other motor graders was too high and it now states that at this date it is cutting down the price fixed for the other motor graders and also raising our price from five to twenty-five cents per hour for

some classes of graders, to \$3.75 per hour from \$3.50, and others to \$3.55 from \$3.50. And there is also offered here our last reply to this letter, in which we ask why this discrimination and ask that the price be fixed in conformity with the price fixed for those of a competitive supplier of the same service, and we feel that is pertinent and relevant in this case. That is the purpose of offering these exhibits.

Mr. Wagner: If the Court please, the case is based upon certain rates, base rates that were established rates of the Kuckenberg Construction Company during the period of March of 1942. The regulation providing for base period and rates that were established as being the ceiling rates for the Kuckenberg Construction Company also provided for a remedy of making application where no such rates were established or where there was hardship by virtue of the fact that the rates were too low by application to the OPA in Washington.

Mr. Gentner: Where is that hardship section? I don't find that, Mr. Wagner. Which do you refer to?

Mr. Wagner: Well, it is that section that provides for [70] the application of Procedural Regulation No. 1.

Mr. Gentner: Which one are you referring to by number? I don't follow you.

Mr. Wagner: I don't find it right offhand for you, Mr. Gentner.

Mr. Gentner: I don't believe it is there. I haven't been able to find it, I might say.

Mr. Wagner: But there is a provision in the regulation that provides for an application under Procedural Regulation No. 1, as well as for an application under the various provisions that are set forth in 1399.6 under (2) and (3). Now this correspondence deals with rates of other contractors, correspondence that is dated as late as May 24th, 1944, some of it I believe later, and it has no bearing, no application, no relevancy to the situation that existed at the time when the rates of Kuckenberg Company were first established and when they become effective. And the correspondence and the copies are, therefore, objected to on that ground.

Further, there is no discrimination pleaded here affirmatively, and to let this correspondence go in at this time certainly would be doing nothing more than letting into this particular record anything that may pertain to the establishment of rates, and anywhere, at any time, without regard to the provisions of the applicable regulation or the Price Control Act. [71]

Mr. Gentner: I would ask that our answer be amended to conform to the position we have stated here, if there is any question about the pleadings not covering that point.

The Court: They may be marked and I will rule on their admissibility at the trial.

Mr. Gentner: Mr. Wagner, will you require us to bring witnesses in to identify copies, or are you willing, so far as the identification is concerned, to waive that, reserving merely your objections to the

relevancy of them? It will just mean bringing in these local people to identify their documents.

Mr. Wagner: I am going to object to them and I am going to ask you to bring them in.

Mr. Gentner: You want these men brought in?

Mr. Wagner: Most assuredly, because permitting that sort of correspondence to go in, I don't know anything about the United Contracting Company, Porter Yett, nor any of the other contractors, and obviously there are thousands of them, and permitting this type of correspondence to be injected into this case would be doing nothing more than asking for leave to almost introduce anything in the case pertaining to the contracting business.

Mr. Gentner: Well, I wasn't asking you to admit the relevancy of them; just merely the identification of the documents.

Mr. Wagner: No. I would like to have you put the testimony [72] on at the proper time and introduce them.

Mr. Gentner: Well, if they can be marked as offered, in any event.

The Court: Wherever possible mark them in groups. Can those be grouped?

Mr. Gentner: Yes, they can, your Honor. Those can be grouped.

(The photostatic copies of the five letters constituting correspondence with the Office of Price Administration, so offered, consisting of six photostatic sheets and five letters, were marked Defendants' Pre-Trial Exhibit 19 with subnumbers 19-a to 19-e, both inclusive.)

Mr. Wagner: Have you already made offers of these?

Mr. Gentner: I thought I had. If not, I will offer them. All of these are identified, 15, 16, 17 and 18.

In support of our position that we are taking here to the effect that there is no provision in the regulation for the establishment of a fully operated rate as of March 31, 1942, I have here copy of a letter from the Mid-Columbia Sand & Gravel company to the Office of Price Administration at Washington, D. C., dated May 11th, 1943; answer of the Office of Price Administration at Washington, D. C., to the Mid-Columbia—Mid-City—I guess it is Mid-Columbia Sand & Gravel company, dated May 27, 1943; carbon copy of letter from Ralph R Gay to the Office of Price [73] Administration, Washington, D. C., dated April 16, 1943; answer of the Office of Price Administration at Washington, D. C., to Ralph R. Gay, dated May 7th, 1943; photostatic copy of letter from the Office of Price Administration at Washington, D. C., to J. A. Lyons, of this city, dated August 18th, 1943; answer of J. A. Lyons to the Office of Price Administration at Washington, D. C., dated September 24th, 1943; reply from the Office of Price Administration to J. A. Lyons dated October 1st, 1943.

These, I presume, could all be offered in one group and are authority from the Office of Price Administration at Washington, D. C. to the effect that there can be no fully operated rate established as of March 31st, 1942, with reference to the fact

that such a fully operated rate had been in use at that time, which is the position assumed by the plaintiff in this case.

Mr. Wagner: The same objection, your Honor.

Mr. Gentner: Now will you waive the requirement of bringing these parties in for identification.

Mr. Wagner: No, I won't, Mr. Gentner. You will have to have them.

Mr. Gentner: How about the letters from your office to these gentlemen?

Mr. Wagner: Well, any correspondence from our office to the gentlemen certainly will be in our possession, subject to the [74] same rules of evidence that apply to other matters in our files.

Mr. Gentner: Can you agree that they were written by your office to these gentlemen?

Mr. Wagner: If you would like to give me an opportunity to verify that.

Mr. Gentner: Well, we will ask that these be marked to be offered. We are offering them.

The Court: They may be marked.

Mr. Wagner: The same objection, your Honor.

The Court: I understand.

(The photostatic copies, etc., of correspondence with the Office of Price Administration, consisting of seventeen pages, so offered, was marked Defendants' Pre-Trial Exhibit 20, the pages being marked 20-a to 20-q, both inclusive.)

Mr. Gentner: Now so there will be no misunderstanding as to our position, we have agreed that all

these itemizations submitted by the different bills of A. J. Goerig, and Buckler Company and Lease & Leigland, correctly state the hours of the rentals and the rate charged, but we do not admit the relevancy of those documents because it is our position that no fully operated rate could be established by the fact that the rate may have been charged as of March 31, 1942, and, therefore, those documents would be entirely irrelevant and would serve no useful function at all. And, likewise, we admit the signatures on the Kaiser Company contract [75] and vouchers and their genuineness, so as to relieve of the necessity of bringing the witnesses to identify them, but, again, the same objection as to their relevancy prevails, in that it is our position that this contract with the Kaiser Company and the vouchers do not establish or show any established charge in effect for any operating and maintenance service as of March 31, 1942, show a fully operated rate for a contract entered into prior to that date but no evidence of any established charge in effect as of March 31, 1942, for any operating and maintenance service.

Now I have here a computation of the charges—I will phrase that a little differently—a computation of the rentals furnished to A. J. Goerig, computed in accordance with the OPA regulation and their price-fixing letter of February 5th, 1943, showing the possession time of each piece of equipment and the charge that would be proper under the OPA regulation in their price-fixing letter of February 5th, 1943, to Kuckenberg Construction Company,

showing total charge under this OPA of \$106,-578.55. I have a copy here for you, Mr. Wagner. And I will ask that this be marked for identification, and we offer it in evidence.

(The document so offered, consisting of 15 sheets, the first of which bears date March 9, 1944, with the heading "Sold to A. J. Goerig Construction Company," "Summary of Equipment Possession by Lessee for OPA Regulation #134 Rental Basis," was marked Defendants' Pre-Trial [76] Exhibit 21.

Mr. Gentner: We admit having received payment from the A. J. Goerig Construction Company \$94,501.80. Similarly I have here a like computation for rentals to the various Buckler companies and Lease & Leigland.

Mr. Wagner: Are you offering this first, or are you offering all of these together?

Mr. Gentner: Yes.

Mr. Wagner: I would like to make my objection.

Mr. Gentner: Why not put in the two? They are identical. Here is a copy of the Buckler and Lease & Leigland.

Mr. Wagner: The objection is that they are not properly identified; that they are incompetent, irrelevant and immaterial; that they are not the best evidence; that they serve no purpose as to the issues in this particular matter.

(The computations as to the various Buckler companies and Lease & Leigland, so of-

ferred, being bound in one volume, were marked Defendants' Pre-Trial Exhibit 22.)

Mr. Gentner: Now I am offering here an original contract between Kuckenberg Construction Company and A. J. Goerig.

The Court: Did you intend to make some further statement about Buckler, or about this second job, anyhow? You went on and made a statement about admission of the amount you received in one of the cases. You didn't make a similar statement as to the other. [77] Did you intend to do so?

Mr. Gentner: I just don't know what that total amount was for Buckler. I don't believe I have that amount.

The Court: I am not especially interested. I just thought maybe you had overlooked it.

Mr. Gentner: I don't believe I have that amount, your Honor, of the Buckler and Lease & Leigland. But in any event it is considerably less than the amount shown by the billing here as worked out under the OPA regulation.

The Court: Do I understand your point to be that you have not violated the regulation?

Mr. Gentner: That is right, your Honor. We say that by computing the charges which we were entitled to charge under this regulation, the amount of money that we received and the amount of money that we billed is less than the amount that we were entitled to charge under the regulation and under our letter from Washington, D. C., of February 5th, 1943, and which Mr. Wagner ignores, and our con-

tracts and our prices were figured by Mr. Charles Miller, who was the former Chief Price Specialist of the Office of Price Administration here at Portland, Oregon, for quite a length of time and during the period that this work went on.

The Court: What is the word you used a moment ago? You say Mr. Kuckenberg received a letter which Mr. Wagner "ignored?" Is that the word you used?

Mr. Gentner: Yes. He feels that it is not relevant or pertinent [78] in this case. He is proceeding on a theory that our rate was fixed by virtue of the fully operated rate, which he claims was true under a contract entered into in February, 1942, with the Kaiser Company. Now the Office of Price Administration has taken the position that there can be no fully operated rate established by virtue of the usage in February—in March, 1942, or under the regulation at all, and I think reading the regulation also indicates that there can be no such a rate. We did file in Washington for a rate and were allowed a rate, and under that rate that was allowed by the Office of Price Administration in Washington, D. C., on February 5th, 1943, which, according to their own rules and interpretations became retroactive to any contracts entered into subsequent to this Amendment No. 3, which went into effect on October 22nd, 1943, our prices are less than the amount we are authorized to charge under their fixed figures and rates for us for operating and maintenance service, and also for the bare rental.

This, I might say, is a computation which includes a computation of the bare rental, which is a very intricate and difficult thing to figure out and requires a specialist to do so. I don't believe that I could figure it out myself. We had a price specialist do that for us, whose business it was to do that and who is familiar with it.

Now as an illustration of the manner in which these rates vary, I have here an analysis of the rates for bare rental that would be admissible and permissible, I might say, of the various [79] pieces of equipment rented to Goerig, and I also offer that in evidence. Here is a copy, Mr. Wagner. That shows a variation for tractors of a price of \$3.72 per hour to \$25.61 per hour; a variation in the price for tractors with carryalls, a low of \$5.63 per hour to a high of \$17.65 per hour; and a variation in the price for motor patrol graders of \$1.98 per hour to a high of \$5.10 an hour. The price under the OPA regulation for bare rental varies with the possession time and various other factors and is not a constant rate. The practice prior to the regulation had been to charge so much per hour for the rental but the OPA felt that this was not a proper way of figuring rental, so they have a complicated procedure whereby you have to take into account the possession time and the operating time and a lot of other factors, and then the rate jumps, as I say, anywhere from \$3.72 an hour up to \$25.61 an hour, and like amounts, and when you are all through—you can't tell your price until you are all through with the job, then you have to sit down and

figure all these factors; then you can arrive at the rental charge.

Mr. Wagner: Are you making an offer of that, Mr. Gentner?

Mr. Gentner: Yes, I am offering it.

Mr. Wagner: The same objection.

Mr. Gentner: I might say this was prepared also by Mr. Miller, the price specialist.

(The statement so offered, headed "Hourly Rate Analysis — Bare Rental — Kuckenberg-Goerig Rental, 1942-1943," [80] was marked Defendants' Pre-Trial Exhibit 23.)

Mr. Gentner: And I am offering here the original contract between Kuckenberg and Goerig dated November 30th, 1942, and the agreement for an extra \$2.00 per hour between the same two people, dated January 9th, 1943. On the reverse of the second document is a blueprint of the site of the job, Bremerton.

(The contract so offered, dated November 30, 1942, signed Kuckenberg Construction Company, Henry Kuckenberg, Partner, addressed to A. J. Goerig Construction Company, and accepted by A. J. Goerig Construction Co. and G. W. Walch, was marked Defendants' Pre-Trial Exhibit 24; and the agreement so offered dated January 9, 1943, signed Kuckenberg Construction Company, Henry Kuckenberg, Partner, addressed to A. J. Goerig Construction Company, and accepted by A. J. Goerig Construction Company, was marked Defendants' Pre-Trial Exhibit 25.)

Mr. Gentner: I am offering here a summary, a recapitulation and itemization of all of the unusual breakage, wear and tear which we claim on the Goerig job. This sets forth, item by item, each part and each repair work that we claim constituted unusual wear and tear on the Goerig job, showing a total of \$33,552.63, and that is supported by the payrolls, time sheets and invoices which I have here, and I presume they are too bulky to be introduced. We support that [81] summary by these documents, and I will offer both the summary and all these documents in evidence in support of our claim of unusual wear and tear.

Mr. Wagner: This, your Honor, is matter that previously has been indicated to be admissible, provided, however, its relevancy to the unusual wear and tear issue could be shown. Now I assume that its introduction at this time would only be subject to the objection along those lines, and we have no objection to the originals. We would like to have the originals introduced, this being only secondary evidence, but we would like to have the objection of relevancy stand throught until trial.

Mr. Gentner: These are original documents, Mr. Wagner. You said they are secondary.

Mr. Wagner: No. The one you are offering?

Mr. Gentner: No, yes; that?

Mr. Wagner: The one you are offering.

Mr. Gentner: That, of course, is a matter to be developed by testimony. It shows our position and is a summary which indicates all the parts that we claim constitute unusual wear and tear.

Mr. Wagner: Then may it be stipulated that the originals will be available at the time of trial in connection with this?

Mr. Gentner: Yes; and we will have them here to introduce.

(The recapitulation and itemization of unusual breakage, wear and tear on the Goerig job, consisting of 12 sheets attached together the first being headed [82] "Bremerton Airport—Kitsap County, A. J. Goerig Contract. Recap—Repairs Bremerton Tractors," etc., so offered, were marked Defendants' Pre-Trial Exhibit 26.)

The Reporter: The others are not to be marked?

Mr. Gentner: I don't see how they can be marked very well. They consist of hundreds of invoices and payrolls.

The Court: You don't need to leave them here.

Mr. Gentner: Invoices and payrolls that would be almost impossible to identify, I presume. I have here a letter from H. L. Morian, Major of the Corps of Engineers, addressed to Kuckenberg Construction Company from Seattle, Washington, dated March 24th, 1943, threatening to blacklist the Kuckenberg Construction Company if they remove their equipment from the Goerig job, and I offer that in evidence.

Mr. Wagner: What might be the purpose of that, Mr. Gentner?

Mr. Gentner: Well, I think that would show——

Mr. Wagner: I don't see that is has any relevancy here.

Mr. Gentner: Well, I suppose as long as you admit the unusual wear and tear I don't think it would have. I will withdraw that. I have here a picture of the "Caterpillar" Diesel D8 tractor, which I think would be helpful in understanding the testimony in regard to unusual wear and tear. I will offer that in evidence.

(The photograph of "Caterpillar" Diesel D8 Tractor so offered was thereupon marked Defendants' Pre-Trial [83] Exhibit 27.)

Mr. Gentner: As well as three photographs here of tractors and carryalls. The testimony in regard to unusual wear and tear will develop technical testimony in regard to parts that were worn out due to the unusual conditions, and an understanding of them would be easier if there were these pictures available that can be used by the witnesses who will testify as to the particular parts that were worn out and the manner in which the unusual wear and tear occurred.

Mr. Wagner: Are these on the particular job?

Mr. Gentner: No, they are not.

Mr. Wagner: Well, I would not have any objection to photographs——

Mr. Gentner: They are merely pictures of—we have none of them on that job. They are merely pictures of the equipment, showing what the equipment was that is involved.

Mr. Wagner: But I think one picture of the

equipment is sufficient. I don't believe that pictures of other locations and other work is relevant.

Mr. Gentner: I might say that they are also relevant for the purpose of showing the type of work and the type of soil and conditions that this equipment is suited for, and that will contrast with the conditions that were present on the Goerig job. Now part of the unusual wear and tear will be due to the soil conditions partially up at the Bremerton job and also to the manner in which they were used. Now these photographs illustrate soil, normal soil [84] conditions and normal usage; that is, usage in a straightaway rather than in a circular loading proceeding, and they are also offered for that purpose.

Mr. Wagner: I don't see that photographs of other work and other jobs have any place at all in this trial and I object.

The Court: They may be marked.

Mr. Gentner: Well, we would like them marked for identification and we offer them. You were agreeable to the picture of the tractor, were you?

Mr. Wagner: No objection to the tractor picture.

(Thereupon the photograph of "Caterpillar" Diesel D8 Tractor, so offered, was marked Defendants' Pre-Trial Exhibit 27, and the three photographs of Tractors and Carryalls, so offered, were marked, respectively, Defendants' Pre-Trial Exhibits 28, 29 and 30.)

Mr. Gentner: I have here a letter from the Con-

tinental Casualty Company, Seattle Branch, to Henry Kuckenberg, dated March 10th, 1944, attached to which is a copy of the bond furnished by A. J. Goerig on this particular job that the equipment was rented on, showing that A. J. Goerig was an individual rather than a partnership. We will offer that.

Mr. Wagner: Well, is there any particular point involved?

Mr. Gentner: I think it is claimed here that Goerig—we have been sued as having rented to a partnership and we say that we dealt [85] with an individual.

Mr. Wagner: Didn't we make a correction in our pleadings to that effect?

Mr. Gentner: No, you did not.

Mr. Wagner: I don't see that it has any relevancy. We certainly would have the Court's permission to amend in case that were the case, and it has no bearing on any particular issue involved here.

The Court: If that don't need to come in then.

Mr. Gentner: We will offer that.

The Court: It won't need to come in, in view of his admission.

Mr. Gentner: Now I have here a series of invoices of—I will count them—a series of requisitions, rather. These are requisitions from George H. Buckler, Contractor, to Kuckenberg Construction Company, which we are offering to show that they have on their face and as part of them a requirement that the price is not to exceed OPA ceiling

prices, and these same requirements govern all of the Buckler requisitions and I will offer these.

Mr. Wagner: These deal entirely with the work?

Mr. Gentner: The Buckler work.

Mr. Wagner: With the Buckler work?

Mr. Gentner: That is correct.

Mr. Wagner: That is the subject of this suit?

Mr. Gentner: Yes, the subject of this suit.

Mr. Wagner: May I ask, are these all of the requisitions?

Mr. Gentner: No, they are not all of them. All of them probably [86] run into, I imagine, some hundreds. I have just taken a quantity at random. I don't know how many there are. I didn't count them. They are offered for the purpose of showing that this requirement governed all of the Buckler business; that is, right on the requisition was a requirement that the price was not to exceed the OPA price ceiling.

Mr. Wagner: Well, I have no objection to the point that you are making for it but I certainly think they are irrelevant unless they are the subject of this suit.

Mr. Gentner: Yes, they are.

Mr. Wagner: In some way connected with it.

Mr. Gentner: Yes, they are.

Mr. Wagner: Now if they are picked at random I think we ought to have all of them that are connected with this action instead of only a few at random. I haven't any objection to the point Mr. Gentner makes as to what they have on their face,

but most assuredly I think if we are going to have a part or some that are picked at random out of the requisitions and they state prices, I think that we ought to have all of them.

Mr. Gentner: I think Mr. Kuckenberg says that is all that we have. You have some, don't you, Mr. Wagner?

Mr. Wagner: Not that I know of.

Mr. Gentner: We turned over all the rest of our Buckler records to you and this is all we have. You received the rest.

Mr. Wagner: Very well. [87]

Mr. Gentner: That is all we have, and the rest of the Buckler requisitions, each shows a requirement that the price is not to exceed the OPA prices.

Mr. Wagner: Very well. We have no objection. Then that is all?

Mr. Gentner: Yes, sir.

(The requisitions from George H. Buckler, Contractor, to Kuckenberg Construction Company, consisting of 29 sheets, so offered, were marked Defendants' Pre-Trial Exhibit 31, pages numbered 1 to 29, both inclusive.)

Mr. Gentner: I wanted to call the Court's attention to the fact that the copies of the regulation which were furnished to the Court by the Office of Price Administration vary in one respect from the printed copy which I think probably is the authentic copy, in that there is a colon after the word "following" in section 1399.6, subsection (2) (b) (1),

where it reads "the maximum charge for such service shall be a charge which has been determined on the basis of the following," there is a colon there in the printed copy but none in the copy which has been furnished to Your Honor, and in the copy that has been furnished to Your Honor it would read, "which has been determined on the basis of the following labor rates in effect on March 31," whereas it should read, "on the basis of the following:" labor rates in effect and material prices in effect. So that if that should come into question I believe that the true regulation has the colon in it. And I would like at this time also [88] to ask whether Mr. Wagner will concede that there was no specific authority from the Administrator for the institution of this action against the Kuckenberg Construction Company for treble damages.

Mr. Wagner: The point was raised at the last conference, your Honor, and since that time the delegation of authority has been introduced in the Wheeler case. That same situation will apply in this matter likewise; that is, namely, the Administrator's General Order No. 3 as amended, and the Federal Register numbers I don't recall right off hand. There was a teletype redelegation of that authority under date of June 4th, 1943, which supplemented a memorandum of April 23rd, 1943; it was the final authority memorandum in connection with the delegation of authority to institute actions in proceedings. That same situation, your Honor, will apply in this case as in the Wheeler case.

The Court: Mr. Wagner, this will help both of you. This is a little excerpt from the Wheeler proceedings, if you want it. There is the reference to Federal Register, if you want to put that in this record.

Mr. Wagner: Thank you, your Honor.

Mr. Gentner: I don't believe you made any specific answer to my question, Mr. Wagner. Do you concede there was no specific authorization by the Administrator to institute this action for treble damages?

Mr. Wagner: No. The situation, Mr. Gentner, is just as I have stated in connection with the institution of this action. [89]

Mr. Gentner: I don't think you have answered my question whether you do or don't.

Mr. Wagner: I am not on the witness stand, Mr. Gentner. I can't make it any more clear, I don't believe, that the authority to institute this action emanated from delegation of authority as found in Federal Register 7281, issued the 2nd day of October, 1942.

Mr. Gentner: I think I was present when you brought that general order out in the Wheeler case.

Mr. Wagner: That is right.

Mr. Gentner: So that I am familiar with that claim there.

Mr. Wagner: That is the authority upon which this action was instituted, and no other.

The Court: That answers your question.

Mr. Gentner: That does, your Honor. And I would like to ask whether you will concede that

there has been no other action filed against anybody else for treble damages for alleged overcharges of rentals of road construction and maintenance equipment here in this district?

Mr. Wagner: I think the Court records will speak for themselves, Mr. Gentner.

Mr. Gentner: That is all that we have, your Honor.

Mr. Wagner: In connection with the last point, I would like to have an opportunity to supplement this record with a copy of the teletype of June 4th, as was done in the Wheeler case. I don't have a copy of it here and I would like to have it introduced. [90] Likewise I would like to have the record include those provisions of the General Order No. 3 as are relevant, and also the material portions of the memorandum from San Francisco to the Portland District Office under date of April 23rd, 1943, as was done in the Wheeler case.

The Court: Yes.

Mr. Gentner: I have one other matter, your Honor. There is still pending before this Court the motion to quash the subpoena duces tecum directed to five persons, including Mr. Wagner and various others in connection with the Oregon Transfer Company, and that motion I believe has not been disposed of.

The Court: I won't rule on it. I am not prepared to rule on it at this time.

Mr. Gentner: All right.

The Court: Mr. Gentner has finished now. Any-

thing you want to say this morning, Mr. Wagner? Mr. Bragg, retrieve my little book.

Mr. Wagner: Thank you, your Honor. No, your Honor. I believe with the reservations that I just made that constitutes our case.

The Court: I believe on Wednesday the Wheeler case is to be argued.

Mr. Wagner: Yes, your Honor.

The Court: Will you be among those present, Mr. Gentner?

Mr. Gentner: I rather imagine so, your Honor.

The Court: We will at least have a one-man gallery. All right. [91] Thank you.

(Thereupon, at 11:35 A. M., the foregoing proceedings were adjourned.)

[92]

[Title of District Court and Cause.]

Civil No. 2290.

REPORTER'S CERTIFICATE

I, Alva W. Person, hereby certify that I reported in shorthand the proceedings had upon the pre-trial conference had in the above entitled cause on Monday, May 22, 1944, and on Monday, June 12, 1944, in the above entitled Court, before the Honorable Claude McColloch, Judge, and thereafter prepared a typewritten transcript from my shorthand notes so taken, and the foregoing and hereto attached 72 pages of typewritten matter, pages numbered 21 to 92, both inclusive, contains a full,

true and accurate transcript of my shorthand notes so taken by me as aforesaid, and of the whole thereof.

Dated at Portland, Oregon, this 19th day of August, 1944.

/s/ ALVA W. PERSON

Court Reporter.

[93]

[Title of District Court and Cause.]

Portland, Oregon, Tuesday, November 14, 1944.

10:16 o'clock A. M.

Before:

Honorable Claude McColloch, Judge.

Appearances:

Mr. F. E. Wagner appearing on behalf of the plaintiff.

Mr. A. W. Gentner appearing on behalf of defendants.

TRIAL PROCEEDINGS

The Court: Did you intend to include in the pre-trial order, Mr. Gentner, that the offense, if any, was not willful? [94]

Mr. Gentner: I am sorry, I didn't understand, your Honor.

The Court: Did you intend to include the question of willfulness in this pre-trial order under the amendment to the statute?

Mr. Gentner: Yes, your Honor.

The Court: That is not in the pre-trial order. That should be stated as an issued if you intend to claim that.

Mr. Gentner: I thought we had put it in. I am sorry.

The Court: Just put it in during the noon hour. You will have to rewrite the last page. Then I will sign it. You had better put it in in line with the statute. You will find in the Wheeler case the statute was followed pretty carefully there.

Mr. Gentner: I will do that, your Honor.

Mr. Wagner: Just a few remarks, your Honor. The Court will recall that the subject of the controversy is rental of construction and road maintenance equipment. The matters involved here are particularly free from different agreements or contracts for the performance, and the furnishing of this type of services by Mr. Kuckenberg and his concern. One involves the performance of a contract up or near Bremerton, Washington, in the construction of an airfield. The other is similar services performed by the Buckler Construction Company, and the third is similar services performed for Lease & Leigland, who are also general contractors. [95]

The state of the pleadings, to review just a little bit, originally there was filed an application for an order requiring the inspection of certain records of the Kuckenberg Construction Company. The order was granted and certain records were submitted. As the result of the construction of those records and the calculations and computations made there-

from the excessive or illegal charges were found, as contended by plaintiff, in connection with the Lease & Leigland and the Buckler Construction Company services. As to those services the defendants have consistently claimed the privilege against self-incrimination.

The other, or the first contract, namely, with the Goerig Construction Company, was taken from records other than the defendants' and of course no claim of privilege there is being made.

Now originally a complaint was filed in this case, numbered 2290, against the Kuckenberg Construction Company, involving excessive charges only in connection with the Kuckenberg Construction Company contract.

As a result of the inspection of the records an amended complaint was filed in that case adding the excessive charges in the other two instances. To this amended complaint defendants filed their answer raising two defenses, the general denial and the claim of the privilege, and then following that the defendants served plaintiff with certain [96] interrogatories to be propounded to T. H. Fraser, and also an application for subpoena duces tecum. Subpoena was issued, a subpoena directed to myself, George Black, Jr., Charles B. Wegman, and certain officials of the Oregon Transfer Company, for disclosure of certain records and information.

To that the plaintiff filed a motion to quash. I believe that the Court still has that situation under advisement.

There was also filed thereafter by the defendants, pursuant to the Rules of Civil Procedure, a request for admission of facts and genuineness of documents, and which the plaintiff answered denying the request, and then there was a motion by the defendants for the production of documents and for inspection and photographing, also filed pursuant to the Federal Rules, which the Court took under advisement; and thereafter the pre-trial order was settled as between Mr. Gentner and myself.

It is, briefly, plaintiff's position, and it is probably disclosed quite clearly by the pre-trial order, that the plaintiff relied upon certain established rates which were in effect as between the Kaiser Shipbuilding Corporation and the Kuckenbergers on the 31st day of March, in 1942. Those rates were taken by the Administrator as being the selling prices for these services for the Kuckenberg Construction Company. [97]

Another situation developed, as far as Kuckenberg Construction Company was concerned, subsequent to that time, namely, during January of 1943 Kuckenberg Construction Company filed an application purportedly pursuant to certain provisions of the applicable price regulation, M.P.R. 134, in order to establish and have approval of certain operating rates which they claimed to be theirs. Approximately thirty days later the Washington Office of Price Administration denied those particular rates but set forth other rates, to which it indicated no objection would be made.

It is our position in connection with that particular application, and the subsequent denial of it, that inasmuch as the Kuckenberg Construction Company had in effect on March 31st, in 1943, or March of '42, certain rates for these particular services, that those would be the rates, they being required by the regulations to use these as the ceiling rates instead of their filed rates or their applied-for rates, or instead of the allowed rates by the Washington office.

That, primarily, is the meat, I believe, of the whole case in connection with rates.

Now the price regulation, as I indicated, was Maximum Price Regulation 134. I believe there was submitted for your Honor's file copies of the regulation. That regulation sets forth particularly in connection with operating and [98] maintenance rates in Section 1399.6 the various methods of establishing an operator's rates. This portion of the regulation became effective October 22nd, 1942, and by virtue of Amendment 3 sets forth the three particular methods of establishing rates. In Section A is set forth the method which the plaintiff assumes and urges is the correct method; in Section B is set forth another method of establishing rates, that is by application; and Section C sets forth a similar or third method by application to the Washington office for the establishment of rates.

Now it is plaintiff's position that Section B does not apply where there were different operator established rates in effect on March 31st, 1942.

There is one other situation that enters into this

case that is probably entirely a question of fact, and that is the contention of the defendants that in the performance of the work for the Goerig Construction Company there were unusual circumstances and unusual wear and tear accorded the equipment by virtue of the terrain and the ground that had to be worked. The extent of those is conceded to be subject to offset as to the prices that are accorded under the established rates, as contended by the plaintiff; subject, however, to proof, clear and explicit, that the charges actually were the result of extraordinary wear and tear on equipment.

Now just how defendant intends to establish that [99] part of his case I don't yet know, although he has indicated that there may be some difficulty in segregating the rates for that particular thing.

It is our contention, further, that in the event that defendants' contention that a filed or approved rate should govern in this particular case, that extraordinary wear and tear in any event should also be subject to an application and approval by the Washington office in establishing that rate. That was not done in this case—in any case.

There is also a question I believe involving an amount which was billed by the Kuckenberg Construction Company to the Goering Construction Company, all of which was not paid. The question presented is whether or not that should be considered in arriving at the excessive consideration charged by the Kuckenberg Construction Company.

Now it is not exactly clear to me, as far as the defendants' contentions are concerned, in connec-

tion with their desire to examine other operators' records. In connection with their desire to examine other operators' records in this area as to whether they are trying to establish their own rates by a comparable rate, or whether they are attempting to inject into the controversy the element of discrimination. It is not just exactly clear to me, although previous indications were that the discovery element does [100] have a bearing in this case, as far as the defendants are concerned.

I believe, your Honor, that that covers the situation as we see it from the plaintiff's view.

Mr. Gentner: I think the defendants, however, are pretty well covered by the contentions set forth in the pre-trial order, with the exception of the fact that it will be our contention that, if any violation is established, it was not willful, and we would like to embody that in the pre-trial order.

Mr. Wagner: I have no objection to the amendment of the pre-trial order to that effect. Do we have the pre-trial exhibits available?

The Court: In a case like this the practice has been found to be better just to introduce all of the exhibits identified at pre-trial, subject to the objections, if any, that may have been set out at the pre-trial hearing.

Mr. Wagner: That is perfectly agreeable with me.

Mr. Gentner: That is agreeable with me, your Honor.

The Court: The exhibits will have the same

numbers as trial exhibits as they do as pre-trial exhibits, 1, 2, 3, and so on.

Mr. Wagner: The plaintiff, then, first offers contract between the Kaiser Company——

The Court: No. You just put them in in gross.
[101]

Mr. Wagner: Very well, then.

The Court: All the exhibits are in now as they are, exhibits on both sides, bearing the same numbers as given at pre-trial, subject to the objections, if any, stated at the time of the pre-trial, except where objections may have been reserved, and, if so, additional objections may be stated now or at any time during the trial.

Mr. Wagner: Very well.

The Court: Tax cases are very much like this case, and that is the practice we have developed in those cases. It makes for shortness of the proceedings.

Mr. Gentner: I would just like to examine what objections have been made.

The Court: You don't need to be on the alert about that right now. You can do it at any time during the day or at the conclusion of the trial.

Mr. Wagner: Well, it would seem to me that, save for the objections that the defendants have interposed, the plaintiff's case is all in, then.

The Court: Well, I rather thought so from running through the file again in the last few days.

Mr. Wagner: Yes.

The Court: Your case is in on the records.

Mr. Wagner: Is there any matter, Mr. Gentner, that, as far as plaintiff's case is concerned, you would care to have [102] proof on?

Mr. Gentner: No, there is not. I did not admit the relevancy of the exhibits, Plaintiff's exhibits, and I don't know whether I interpose——

The Court: Well, I am going to say in this case, as I have done in the tax cases, without going through all of these things now I am going to admit everything, subject to the objections that were stated at the pre-trial, and those objections may be admitted as being wrong at this time, so your position is reserved here now at the trial.

Mr. Gentner: I don't know if I had objected properly——

The Court: Now then, you can go further. You can refresh yourself at any time during the day, or during the noon hour, and save your objections. I think maybe the ruling would be the same.

Mr. Gentner: That is all right, but would it be all right if I would state some objections now, subject to your rule?

The Court: You don't need to state them now. You may state them to the Reporter at any time.

Mr. Gentner: I see.

The Court: It is just a matter of making your record. That is all.

Mr. Gentner: I see.

The Court: Of course, when it comes to arguing this case, and decision, I am going to have to choose between the con- [103] flicting theories; I appreciate that; the theories that your objections, pro and con,

develop here, and at present everything is in just like in an administrative proceeding. So if you have any testimony on the factual issues, Mr. Gentner, that have not been made in the record, it is time for you to put on your witnesses, I think. Mr. Wagner, if he changes his mind later that his case is not complete on the record, can come in then. We will have no trouble about that.

(The contract between Kaiser Company, Inc., Contractor, and Kuckenberg Construction Co., Subcontractor, etc., having been marked Plaintiff's Pre-Trial Exhibit 1, was further marked "and trial";

The certified copy of payment voucher dated April 18, 1942, payable to Kuckenberg Construction Company, with papers attached, marked Plaintiff's Pre-Trial Exhibit 2, was further marked "and trial";

Letter dated January 15, 1943, Kuckenberg Construction Company to Construction and Road Maintenance Equipment Board, OPA, Washington, D. C., marked Plaintiff's Pre-Trial Exhibit 3, was further marked "and trial";

Letter dated February 5, 1943, Walter Shoe-[104] maker, Head Construction and Extraction Equipment Section, Machinery Branch, OPA, marked Plaintiff's Pre-Trial Exhibit 4, was further marked "and trial";

Statement, five sheets, first head "Kuckenberg Rentals to A. J. Goerig Construction Co., March 10, 1944," marked Plaintiff's Pre-Trial Exhibit 5, was further marked "and trial";

Statement, two sheets, first headed "Kuckenberg Rentals to Buckler Company, etc. Andrew Lee Rapp 3/16/44," marked Plaintiff's Pre-Trial Exhibit 6, was further marked "and trial";

Statement, two sheets, first headed "Kuckenberg Rentals to Lease & Leigland. Andrew Lee Rapp, March 20, 1944," marked Plaintiff's Pre-Trial Exhibit 7, was further marked "and trial";

Statement headed "Cost Summary — A. J. Goerig Construction Co., Bremerton Airport Rental of Equipment," marked Defendants' Pre-Trial Exhibit 8, was further marked "and trial";

Statement headed "Portland Payroll Totals—December 12, 1942, to June 19, 1943," [105] marked Defendants' Pre-Trial Exhibit 9, was further marked "and trial";

Statement dated April 30, 1943, addressed to A. J. Goerig Construction Company and headed "Hauling Charges", marked Defendants' Pre-Trial Exhibit 10, was further marked "and trial";

Statement headed "Summary of Invoices", three typewritten sheets, marked Defendants' Pre-Trial Exhibit 11, was further marked "and trial";

Statement dated October 19, 1943, signed Henry A. Kuckenberg and addressed to Prentiss M. Brown, Price Administrator, etc., marked Defendants' Pre-Trial Exhibit 12, was further marked "and trial";

Statement dated January 6, 1944, signed Harriet A. Kuckenberg and addressed to Chester Bowles, Administrator of the Office of Price Administration,

etc., marked Defendants' Pretrial Exhibit 13, was further marked "and trial";

Statement dated January 6, 1944, signed Henry A. Kuckenberg, addressed to Chester Bowles, Administrator of Office of Price [106] Administration, etc., marked Defendants' Pre-Trial Exhibit 14, was further marked "and trial";

Letter, May 5, 1944, Kuckenberg Construction Co., to Walter Shoemaker, OPA, Washington, D.C., marked Defendants' Pre-Trial Exhibit 15, was further marked "and trial";

Letter dated May 19, 1944, Kuckenberg Construction Co. to Walter Shoemaker, OPA, Washington, D.C., marked Defendants' Pre-Trial Exhibit 15, was further marked "and trial";

Letter dated May 24, 1944, Walter Shoemaker, Head Construction and Extraction Equipment Section Machinery Branch, to Kuckenberg Construction Company, marked Defendants' Pre-Trial Exhibit 17, was further marked "and trial";

Letter dated June 1, 1944, Kuckenberg Construction Co. to Walter Shoemaker, Head Construction and Extraction Equipment Section, etc., marked Defendants' Pre-Trial Exhibit 18, was further marked "and trial";

Photostatic copies of five letters, OPA correspondence, marked Defendants' Pre-Trial Exhibits 19-A to 19-E, were further marked [107] "and trial";

Photostatic copies, etc., of correspondence with OPA, seventeen pages, marked 20-A and 20-Q, both inclusive, marked Defendants' Pre-Trial Exhibit 20, were further marked "and trial;"

Document dated March 9, 1944, headed "Sold to A. J. Goerig Construction Company", "Summary of Equipment Possession by Lessee for OPA Regulation #134 Rental Basis", fifteen sheets, marked Defendant's Pre-Trial Exhibit 21, were further marked "and trial";

Computation as to various Buckler Companies and Lease & Leigland, marked Defendants' Pre-Trial Exhibit 22, was further marked "and trial";

Statement headed "Hourly Rate Analysis—Bare Rental—Kuckenberg - Goerig Rental, 1942 - 1943", marked Defendants' Pre-Trial Exhibit 23, was further marked "and trial";

Contract dated November 30, 1942, signed Kuckenberg Construction Company, Henry Kuckenberg, Partner, addressed to A. J. Goerig Construction Company, accepted by A. J. Goerig Construction Co. and G. W. [108] Walsh, marked Defendants' Pre-Trial Exhibit 24, was further marked "and trial";

Agreement dated January 9, 1942, signed Kuckenberg Construction Company, Henry Kuckenberg, Partner, addressed to A. J. Goerig Construction Company and accepted by A. J. Goerig Construction Company, marked Defendants' Pre-Trial Exhibit 25, was further marked "and trial";

Statement headed "Bremerton Airport—Kitsap County, A. J. Goering Contract. Recap.—Repairs Bremerton Tractors", etc., 12 sheets, marked Defendants' Pre-Trial Exhibit 26, was further marked "and trial";

Photograph of "Caterpillar" Diesel D8 Tractor,

marked Defendants' Pre-Trial Exhibit 27, was further marked "and trial";

Photographs of Tractors and Carryall, marked Defendants' Pre-Trial Exhibit 28, was further marked "and trial";

Photograph of Tractor, Carryall, etc., marked Defendants' Pre-Trial Exhibit 29, was [109] further marked "and trial";

Photograph of Tractor, Carryall, etc., marked Defendants' Pre-Trial Exhibit 30, was further marked "and trial"; and

Requisitions from George H. Buckler, Contractor, to Kuckenberg Construction Company, 29 sheets, numbered 1 to 29, both inclusive, marked Defendants' Pre-Trial Exhibit 31, was further marked "and trial".)

PLAINTIFF'S PRE-TRIAL AND TRIAL
EXHIBIT No. 1

Kaiser Company, Inc.
Vancouver, Washington

July 3, 1942

CHANGE ORDER "D"
SUBCONTRACT No. 3

Kuckenberg Construction Company
11104 N. E. Holman Street
Portland, Oregon

Gentlemen:

1—Reference is made to your Contract No. 3
"Equipment Rental", dated February 9, 1942.

2—To expedite the construction of facilities in

the Vancouver shipyard, it has been necessary to work some of your equipment in excess of the requirements provided in Subcontract No. 3.

Caterpillar Tractor Dozer #G10C and eight yard Carryall was rented from you under the terms of Change Order "A", Item 4. We have used the Caterpillar Tractor Dozer without the Carryall for approximately 1,650 hours.

Caterpillar Tractor #1 with Carryall #56-B, capacity 25 yards, rented from you under the terms of Change Order "B", Item 9, has been used an additional approximate sixty (60) hours.

Two (2) Austin Western blades were rented from you in accordance with Contract No. 3, Payment Schedule, Item I.

Blade #70 has been used approximately 560 hours in excess of the Payment Schedule, Item (1).

Blade #69 will be used 1500 hours in excess of the Payment Schedule, Item (1).

In addition to the above, you have been required to furnish one D-8 Caterpillar Tractor and twenty five yard Carryall No. 66-C for approximately 1,000 hours and one D-7 Caterpillar Dozer No. 52 for approximately 1500 hours.

Payment for the items set forth above will be made as outlined in Paragraph (3) below.

3—Subcontract No. 3, Paragraph 16, "Payment Schedule," is hereby amended by the addition of New Items (Nos. 10, 11, 13, 14 and 15) as follows:

Item	Description	Equipment Rental	Labor, Fuel, Oil, Gas, Repairs, Ins.	Total Unit Price	Approx. Quants.	Approx. Amount
	Rental of equipment to include in each case, operators, fuel, oil, gas, repairs and insurance					
10	D-8 Caterpillar Tractor and 25 Yd. Carryall #66-C Caterpillar: Serial #8R6585P Carryall: Model W-Series #S6330WC. Replacement Value: Cat: \$12,500. Carryall: \$7,500.	\$5.90 hr.	\$4.70 hr. Overtime: .76	\$10.60 .76	1,000 hrs.	\$10,600.
11	D-7 Caterpillar Dozer # 52. Serial #9G5904ST. Replacement Value: \$12,000.	\$4.90 hr.	\$3.70 hr. Overtime: .76	\$ 8.60 .76	1,500 hrs.	12,900.
12	One Caterpillar Tractor Dozer. #D-7 - Serial #G10C, without Carryall. Replacement Value: \$10,000.	\$4.90	\$3.70 Overtime: .76	\$ 8.60 .76	1,650 hrs.	14,190.
13	Caterpillar #1 with Carryall #56-B, 25 Yds. Replacement Value: \$20,000.	\$5.90	\$4.70 Overtime: .76	\$10.60 .76	60 hrs.	636.
14	Austin Western Blade #69. Replacement Value \$10,000.	\$3.90	\$3.70 Overtime: .76	\$ 7.60 .76	1,500 hrs.	11,400.
15	Austin Western Blade #70. Replacement Value: \$10,000.	\$3.90	\$3.70 Overtime: .76	\$ 7.60 .76	560 hrs.	4,256.
Total Amount:						\$53,982.00

4—This Change Order involves an approximate increase in the contract of \$53,982.00.

5—It is understood and agreed that all other terms and conditions of said Subcontract No. 3 and Change Orders "A", "B", and "C" thereto, as modified by Change Order "D", shall be and remain in full force and effect.

6—Therefore, if the foregoing modifications of said Subcontract No. 3 are satisfactory, please note your acceptance in the space provided below.

Very truly yours,

KAISER COMPANY, INC.

Vancouver Yard

/s/ M. MILLER

M. Miller

Assistant General Manager

The foregoing modifications are hereby accepted.

KUCKENBERG CONSTRUCTION COMPANY

(Subcontractor)

By /s/ HENRY KUCKENBERG

Title—Partner

Witnessed By:

/s/ G. M. LEGG

MM:SLC:dbj

Approved

U S M C

/s/ O. A. MECHLIN

Res Plant Engr

7/25/42

Kaiser Company, Inc.
Vancouver, Washington

September 7, 1942

CHANGE ORDER "E"
SUBCONTRACT No. 3

Kuckenberg Construction Company
11104 N. E. Holman Street
Portland, Oregon

Gentlemen:

1—Reference is made to your Subcontract, our No. 3, "Equipment Rental," dated February 9, 1942.

2—To expedite the construction of facilities in the Vancouver Yard, you were authorized and directed by representatives of the Kaiser Company, Inc., to remove from the said Yard for necessary repairs one (1) Austin-Western Blade No. 69 and one (1) D-8 Caterpillar Tractor and 25-yard Carryall No. 66-C, and replace the equipment with one (1) Caterpillar Motor Patrol No. 604 and one (1) D-8 Caterpillar Dozer No. 55. Payment for the additional equipment will be made as outlined in Paragraph (3) below.

3—Subcontract No. 3, Paragraph 16, "Payment Schedule," is hereby amended by the addition of New Items (Nos. 16 and 17) as follows:

Item	Description	Equipment Rental	Labor, Fuel, Oil, Gas, Repairs, Ins.	Total Unit Price
	Replacement Equipment			
16	Caterpillar Motor Patrol #604. Serial #9K4751. Re- placement Value \$10,000	\$2.90 per hr.	\$4.70 per hr.	\$7.60 per hr.
17	D-8 Caterpillar Tractor Dozer #55. Replacement Value \$12,500	4.90 per hr.	3.70 per hr.	8.60 per hr.

4—This Change Order involves no change in the approximate total contract amount.

5—It is understood and agreed that the accrued rental on the Austin-Western Blade #69 and D-8 Cat. Tractor and Carryall #66-C in the amount of \$4,748.25 and \$2,989.00, respectively, shall be applied against the rental purchase value of the Cat. Motor Patrol #604 and D-8 Cat, Tractor Dozer #55.

6—In the event that this contract is renegotiated under the provisions of Section 403 of Public Law 528, approved April 28, 1942, (Sixth Supplemental National Defense Appropriation Act, 1942) the Subcontractor hereby agrees:

(1) If such renegotiation results in a reduction of the contract price, the amount of such reduction shall, as directed by the Chairman of the United States Maritime Commission:

(a) Be deducted by Contractor from payments to Subcontractor under this contract; or

(b) Be paid by Subcontractor directly to the Government; or

(c) Be repaid by Subcontractor to Contractor.

(2) Contractor shall not be liable to Subcontractor for or on account of any amount repaid to

Contractor or paid to the Government by Subcontractor or deducted by Contractor from payments under this contract, pursuant to directions from the Chairman of the United States Maritime Commission in accordance with the provisions of this Article, and Subcontractor will pay to Contractor all amounts withheld by the United States from Contractor and all amounts paid to the United States by Contractor as a result of such renegotiation.

(3) The term "Chairman of the United States Maritime Commission" as used in this Article includes any duly authorized representative of such chairman.

: 7—It is understood and agreed that all other terms and conditions of said Subcontract No. 3, except as modified by Change Orders "A", "B", "C", "D" and "E", shall be and remain in full force and effect.

8—Therefore, if the foregoing modifications of the said Subcontract No. 3 are satisfactory, please note your acceptance in the space provided below.

Very truly yours,

KAISER COMPANY, INC.

Vancouver Yard

/s/ REX C. HAMBY

Rex C. Hamby

Office Manager

The foregoing modifications are hereby accepted:

KUCKENBERG CONSTRUCTION COMPANY

(Subcontractor)

By /s/ HENRY KUCKENBERG

Title—Partner

Witnessed by:

/s/ ESTHER WEIBEL

RCH:SLC:jsm

Approved

U S M C

O. A. MECHLIN

Res Plant Eng'r.

10/5/1942

PLAINTIFF'S PRE-TRIAL AND TRIAL EXHIBIT No. 3

KUCKENBERG CONSTRUCTION CO.

General Contractors

Bus. Phone WE 2259

11104 Northeast Holman Street

Portland, Oregon
January 5, 1943Construction and Road Maintenance Equipment Board,
Office of Price Administration, Washington, D.C.

Gentlemen:

We herewith submit rental rates, which apply to road maintenance equipment on a fully operated basis. The following rates have been in effect during the year 1942, and are being used by us at this time in this locality.

Rental—Name of Equipment	Rate per hr. bare equip.	Rate per hr. Labor & Ins.	Cost per hr.		Total charge per hr, fully operated equipment
			Cost per hr. Gas—Oil Grease & Lubricants.	Repairs, Mainten. Tires—cable service & supervision	
Crawler Deisel Tractor 89-130 HP. with lights, 4 drum power unit, etc.....	\$2.70	\$1.86	\$1.28	\$3.30	\$9.14
With Angle dozer	3.11	1.86	1.28	3.52	9.83
Crawler Deisel Tractor 72-89 H.P. with lights 2 drum power unit & Dozer....	2.45	1.86	1.15	3.14	8.60
Crawler Deisel tractor 52-62 H.P. with attachments	1.76	1.86	1.15	2.29	7.06

Rental—Name of Equipment	Rate per hr. bare equip.	Rate per hr. Labor & Ins.	Cost per hr. Gas—Oil Grease & Lubricants.	Repairs, Mainten. Tires—cable service & supervision	Total charge per hr. fully operated equipment
Motor—Grader Deisel—all wheel drive and steer with attachments.....	\$2.01	\$1.86	\$.90	\$3.23	\$ 8.00
Motor—Grader Deisel—Heavy Dty.....	1.78	1.86	.90	3.46	8.00
Scrapers—16-20½ cu. yd. struck.....	2.19n		.41	2.03	4.63
¾ Yd. Shovel or Hoe with lights.....	1.72	3.32	1.48	3.90	10.42
¾ Yd. Dradline with extra boom and lights	1.91	3.32	1.48	3.71	10.42
1½ yd. Deisel dragline with lights.....	3.09	3.32	2.12	3.97	12.50
10 ton—3 wheel roller—Gas	1.60	1.86	1.10	1.65	6.21
Tractor trailer Units 10-14 yds. with power unit and lights	3.77	1.86	2.03	4.84	12.50
2½ Yd. Deisel Shovel or Dragline.....	6.56	3.61	2.02	4.66	16.85

Respectfully submitted,

KUCKENBERG CONSTRUCTION CO.

.....
Partner

PLAINTIFF'S PRE-TRIAL AND TRIAL
EXHIBIT No. 4

Office of Price Administration
Washington, D.C.
Federal Office Building No. 1
Room 6225

Feb. 5, 1943

In reply refer to: 694:2:PEA MPR 134

Kuckenberg Construction Co.
11104 Northeast Holman Street
Portland, Oregon

Attention: Mr. Henry Kuckenberg, Partner

Gentlemen:

This will acknowledge receipt of your letter of January 5, 1943, in which you submit rental rates applying to road maintenance equipment leased by you on a fully operated basis.

Section 1399.7 of Maximum Price Regulation No. 134 provides that lessors must bill separately the bare rental rates not in excess of the maximum rates listed in Appendix A and operating and maintenance service charges as established by this Office. This Section operates, therefore, to prevent any establishment of a fully operated rate. With respect to operating and maintenance service charges to cover such services as operating crew, fuel, lubrication and repairs other than normal wear and tear, this Office must disapprove the charges suggested by you. After careful consideration of the cost data which you submitted together with information this

Office has obtained from many other lessors of similar equipment, this Office will not object to your using the following rates per operating hour:

Crawler Diesel tractor 89-130 H.P. with lights	
4 drum power unit	\$ 4.30
Crawler Diesel tractor 89-130 H.P. with angle	
dozer	4.40
Crawler Diesel tractor 89-130 H.P. with scraper.....	4.90
Crawler Diesel tractor 72-89 H.P. with lights	
2 drum power unit and dozer.....	3.90
Crawler Diesel tractor 52-62 H.P. with attachments	3.60
Motor—grader Diesel—all wheel drive and steer	
with attachments	3.50
Motor—grader Diesel—Heavy duty	3.50
$\frac{3}{4}$ yd. shovel or hoe with lights.....	5.50
$\frac{3}{4}$ yd. dragline with extra boom and lights.....	5.50
$1\frac{1}{2}$ yd. Diesel dragline with lights.....	6.25
10 ton—3 wheel roller—gas	3.50
Tractor trailer units 10-14 yds. with power unit	
and lights	5.00
$2\frac{1}{2}$ yd. Diesel shovel or dragline.....	6.75

There are two reasons why the rates suggested by this Office are somewhat lower than the ones requested by you. First, we have had to adjust your repair costs by removing repairs due to normal wear and tear, since compensation for such repairs is included within the bare rental. Second, this Office has taken the position that supervision is a service which should be charged to the job rather than to the equipment. To the extent, therefore, that the lessee requires such a service, you may bill this separately or have the supervisor placed upon the payroll of the lessee. We might point out further that this Office prefers to have rates established upon a straight time work week basis with the un-

derstanding that any payments for overtime may be billed separately to the extent that such payments are based upon the wages prevailing on March 31, 1942.

Very truly yours,

WALTER SHOEMAKER

Walter Shoemaker,

Head Construction and Ex-
traction Equipment Section
Machinery Branch

PLAINTIFF'S PRE-TRIAL AND TRIAL EXHIBIT No. 5

KUCKENBERG RENTALS TO A. J. GEORIG CONST. CO. March 10, 1944

Andrew Lee Rapp

Item of Equipment	Month 1942	Hours	Kueckenberg Charge per Hr.	Total Kueckenberg Charge	Celling Price (Mar. 1942)	Total Allowable Charge	Total Excessive Charge
#414 Tractor	December	190½	11.00	2095.50	8.60	1638.30	457.20
#408 Tractor	December	54½	11.00	599.50	8.60	468.70	130.80
#411 Tractor	December	229½	11.00	2524.50	8.60	1973.70	550.80
#420 Tractor	December	232	11.00	2552.00	8.60	1995.20	556.80
#417 Tractor	December	225	11.00	2475.00	8.60	1935.00	540.00
#418 Tractor	December	238½	11.00	2623.50	8.60	2051.10	572.40
#416 Tractor	December	174½	11.00	1919.50	8.60	1500.70	418.80
Total Tractor Hours	December	1344½					
61-B Carryalls	December	225	2.60	585.00	2.00	450.00	135.00
57-B Carryall	December	182½	2.60	474.50	2.00	365.00	109.50
62-B Carryall	December	137½	2.60	357.50	2.00	275.00	82.50
66-B Carryall	December	133	2.60	345.80	2.00	266.00	79.80
							<hr/>
							3633.60

363 Hours Operators Overtime in December @ 1.02 Per Hour.

Taken from itemizations dated { Jan. 9, 1943 } from Kueckenberg Const. Co. to A. J. Goerig Const. Co.
for month of Dec. 1942 { Jan. 8, 1943 }

[Printer's Note]: Adding machine tape figures attached: 3,633.60* 3,851.26 3,423.60 5,803.00
2,111.00 Total 18,822.46*

Plaintiff's Pre-Trial and Trial Exhibit No. 5—(Continued)

KUCKENBERG RENTALS TO A. J. GEORIG CONST CO. March 10, 1944
Andrew Lee Rapp

Item of Equipment	Month 1943	Hours	Kuckenberg Charge per Hr.	Total Kuckenberg Charge	Celling Price (Mar. 1942)	Total Allow- able Charge	Total Exces- sive Charge
#414 Tractor	January	166	11.00	1826.00	8.60	1427.60	398.40
#408 Tractor	January	186½	11.00	2051.50	8.60	1603.90	447.60
#411 Tractor	January	42¾	11.00	470.25	8.60	367.65	102.60
#420 Tractor	January	243½	11.00	2678.50	8.60	2094.10	584.40
#417 Tractor	January	274½	11.00	3019.50	8.60	2419.14	600.36
#418 Tractor	January	282	11.00	3102.00	8.60	2425.20	676.80
#416 Tractor	January	252	11.00	2772.00	8.60	2167.20	604.80
Total Tractor Hours	January	1447¼					
61-B Carryall	January	145	2.60	377.00	2.00	290.00	87.00
57-B Carryall	January	201½	2.60	523.90	2.00	403.00	120.90
62-B Carryall	January	218½	2.60	568.10	2.00	437.00	131.10
66-B Carryall	January	14	2.60	36.40	2.00	28.00	8.40
W Carryall	January	111½	2.60	289.90	2.00	223.00	66.90
							<hr/> 3851.26

479½ hours operators overtime in January @ 1.02 per hour.

Taken from itemization dated Feb. 1, 1943, from Kuckenberg to A. J. Goerig Const. Co. for month of January, 1943.

Plaintiff's Pre-Trial and Trial Exhibit No. 5—(Continued)

KUCKENBERG RENTALS TO A. J. GOERIG CONST Co. March 10, 1944
 Andrew Lee Rapp

Item of Equipment	Month 1943	Hours	Kuckenberg Charge per Hr.	Total Kuckenberg Charge	Ceiling Price (Mar. 1942)	Total Allowable Charge	Total Excessive Charge
#411 Tractor	February	106	11.00	1166.00	8.60	911.60	254.40
#408 Tractor	February	123	11.00	1353.00	8.60	1057.80	295.20
#417 Tractor	February	100	11.00	1100.00	8.60	860.00	240.00
#418 Tractor	February	208½	11.00	2293.50	8.60	1793.10	500.40
#420 Tractor	February	240	11.00	2640.00	8.60	2064.00	576.00
# 61 Tractor	February	235	11.00	2585.00	8.60	2021.00	564.00
# 66 Tractor	February	223½	11.00	2458.50	8.60	1922.10	536.40
Total Tractor Hours	February	1236					
# W Carryall	February	177	2.60	460.20	2.00	354.00	106.20
#61-B Carryall	February	152½	2.60	396.50	2.00	305.00	91.50
#57-B Carryall	February	201½	2.60	523.90	2.00	403.00	120.90
#62-B Carryall	February	231	2.60	600.00	2.00	462.00	138.60
							<hr/> 3423.60

355 hours operators overtime in February @ 1.02 per hour.

Taken from itemization dated March 5, 1943, from Kuckenberg Const. Co. to A. J. Goerig Const. Co. for month of February, 1943.

KUCKENBERG RENTALS TO A. J. GOERIG CONST. CO.

March 10, 1944

Andrew Lee Rapp

Item of Equipment	Month 1943	Hours	Kuckenberg Charge per Hr.	Total Kuckenberg Charge	Celling Price (Mar. 1942)	Total Allow- able Charge	Total Exces- sive Charge
#408 Tractor	March	325½	11.00	3580.50	8.60	2799.30	781.20
# 61 Tractor	March	49	11.00	539.00	8.60	421.40	117.60
#417 Tractor	March	275½	11.00	3030.50	8.60	2369.30	661.20
#418 Tractor	March	389½	11.00	4284.50	8.60	3349.70	934.80
#420 Tractor	March	451½	11.00	4966.50	8.60	3882.90	1083.60
# 66-C Tractor	March	284½	11.00	3129.50	8.60	2446.70	682.80
#411 Tractor	March	294	11.00	3234.00	8.60	2528.40	705.60
Total Tractor Hours	March	2069½					
63-B Carryall	March	215½	2.60	560.90	2.00	431.00	129.30
W Carryall	March	26	2.60	67.60	2.00	52.00	15.60
57 Carryall	March	342½	2.60	890.50	2.00	685.00	205.50
61 Carryall	March	259	2.60	673.40	2.00	518.00	155.40
62-B Carryall	March	311	2.60	808.60	2.00	622.00	186.60
							5659.20

815½ hours operators overtime in March @ \$1.02 per hour.

603 Grader

March 369½

2956.00

7.60

2208.20

143.80

5803.00

Taken from itemization dated April 30, 1949, from Kuckenberg Const. Co. to A. J. Goerig Const. Co. for month of March, 1943.

Plaintiff's Pre-Trial and Trial Exhibit No. 5—(Continued)

KUCKENBERG RENTALS TO A. J. GOERIG CONST. CO. March 10, 1944
 Andrew Lee Rapp

Item of Equipment	Month 1943	Hours	Kuckenberg Charge per Hr.	Total Kuckenberg Charge	Ceiling Price (Mar. 1942)	Total Allowable Charge	Total Excessive Charge
#408 Tractor	April	166	11.00	1826.00	8.60	1427.60	398.40
#418 Tractor	April	140	11.00	1540.00	8.60	1204.00	336.00
# 66-C Tractor	April	144½	11.00	1589.50	8.60	1242.70	346.80
#420 Tractor	April	145½	11.00	1600.50	8.60	1251.30	349.20
#417 Tractor	April	150½	11.00	1655.50	8.60	1294.30	361.20
Total Tractor Hours	April	746½					
57-B Carryall	April	70½	2.60	183.30	2.00	141.00	42.30
61-B Carryall	April	118½	2.60	308.10	2.00	237.00	71.10
63-B Carryall	April	111	2.60	288.60	2.00	222.00	66.60
62-B Carryall	April	122	2.60	317.20	2.00	244.00	73.20
							<hr/> 2044.80
#603 Grader	April	165½	8.00	1324.00	7.60	1257.80	66.20
							<hr/> 2111.00

280½ hours operators overtime in April @ 1.02 per hour.

Taken from itemization dated April 30, 1943, from Kuckenberg Const. Co. to A. J. Goerig Const. Co. for month of April, 1943.

PLAINTIFF'S PRE-TRIAL AND TRIAL EXHIBIT No. 6

KUCKENBERG RENTALS TO BUCKLER COMPANY, ETC.

Andrew Lee Rapp

3-16-44

Item of Equipment	Buckler Req. No.	Kucken- berg No.	Invoice Date	Month of Rental 1943	Hours	Kuckenberg Rate	Total Kucken- berg Charge Less Overtime	Overtime for Operator	Celling Rate Per Hour	Total Al- lowed Rate	Overcharge
Serial DS-1872											
K-600 Austin Western Grader 90M	5210	.....	4- 8-43	March	29½	8.00	236.00	2.88	7.60	224.20	11.80
	5210	.....	5- 1-43	April	114	8.00	912.00	32.64	7.60	866.40	45.60
	5210	.....	6-10-43	May	174½	8.00	1396.00	75.36	7.60	1326.20	69.80
	5210	.....	7-23-43	June	160½	8.00	1284.00	46.08	7.60	1219.80	64.20
	.....	.....	8-20-43	July	222½	8.00	1780.00	67.68	7.60	1691.00	80.00
											280.40
Serial DS-2662											
K-601 Austin Western Grader 99M	.....	.....	2- 5-43	January	201½	8.00	1612.00	83.52	7.60	1531.40	80.60
	3287	.....	3- 4-43	February	236	8.00	1888.00	67.20	7.60	1793.60	94.40
	3287	.....	4- 8-43	March	185½	8.00	1409.80	56.64	7.60	1409.80	74.20
	2750	.....	5- 1-43	April	4½	8.00	36.00	4.32	7.60	34.20	1.80
											251.00
Serial 3396											
K-606 Austin Western Grader 99M	4321	1459	3- 4-43	February	220¼	8.00	1762.00	67.20	7.60	1673.80	88.20
	4321	1450	4-20-43	March	27	8.00	216.00	2.88	7.60	205.20	10.80
	4321	1459	4- 8-43	March	196½	8.00	1572.00	57.12	7.60	1493.40	78.60
	2754	111	4- 9-43	March	52¾	8.00	422.00	15.36	7.60	400.90	21.10
	17837	591	4- 9-43	March	7	8.00	56.00	.....	7.60	53.20	2.80
	4321	.....	5- 1-43	April	107	8.00	856.00	34.56	7.60	813.20	42.80
	4321	.....	6-10-43	May	42½	8.00	340.00	10.08	7.60	323.00	17.00
											261.30
Serial 9K4154-SP											
K-603 Caterpillar Motor Grader #12	4789	.....	5- 1-43	April	74	8.00	592.00	17.28	7.60	562.40	29.60
	4789	.....	6-10-43	May	247	8.00	1976.00	83.52	7.60	1877.20	98.80
	4789	.....	7-23-43	June	138	8.00	1104.00	33.60	7.60	1048.80	56.20
											184.60
Serial 9K-4751-SP											
K-604 Caterpillar Motor Grader #12	1750	.....	2- 5-43	January	73½	8.00	588.00	23.04	7.60	558.60	29.40
	16291	.....	2- 5-43	January	23½	8.00	188.00	7.68	7.60	178.60	9.40
	16291	.....	2- 5-43	January	23½	8.00	188.00	7.20	7.60	178.60	9.40
	16291	.....	2- 5-43	January	26	8.00	208.00	.....	7.60	197.60	10.40
	.....	.....	3- 5-43	February	38½	8.00	308.00	7.68	7.60	292.60	15.40
	16291	.....	3- 5-43	February	6	8.00	48.00	.....	7.60	45.60	2.40
	2612	.....	3- 4-43	February	16	8.00	128.00	7.68	7.60	121.60	6.40
	.....	.....	3- 6-43	February	21	8.00	168.00	.48	7.60	159.60	8.40
	2612	.....	3- 6-43	February	53	8.00	424.00	9.12	7.60	402.80	21.20
	17826	.....	4- 9-43	March	8	8.00	64.00	7.68	7.60	60.80	3.20
	17826	.....	4- 9-43	March	17½	8.00	140.00	9.12	7.60	133.00	7.00
	5227	.....	4- 9-43	March	44	8.00	352.00	11.16	7.60	334.40	18.60
	5227	.....	5- 1-43	April	160	8.00	1280.00	52.13	7.60	1216.00	64.00
											205.20

[Printer's Note]: Adding machine tape figures attached: 280.40* 251.00 261.30 184.60 205.20 Total 1,182.50*

PLAINTIFF'S PRE-TRIAL AND TRIAL EXHIBIT No. 7

KUCKENBERG RENTALS TO LEASE & LEIGLAND

Andrew Lee Rapp

March 20, 1944

Date of Equipment	Date Invoice	Week Ending	Hours	Kuckenberg Rate	Total Kuckenberg Charge	Celling Rate Per Hour	Total Allowed	Overcharge
Austin Western 99M Patrol	12- 8-43	10-20-43	29½	8.00	236.00	7.60	224.20	11.80
Same	12- 8-43	10-27-43	20	8.00	160.00	7.60	152.00	8.00
Same	12- 8-43	11- 3-43	14	8.00	112.00	7.60	106.40	5.60
Same	12- 8-43	11-10-43	10	8.00	80.00	7.60	76.00	4.00
Same	12- 8-43	11-17-43	4½	8.00	36.00	7.60	34.20	1.80
Same	12- 8-43	11-24-43	9	8.00	72.00	7.60	68.40	3.60
Same	12- 8-43	12- 1-43	11	8.00	88.00	7.60	83.60	4.40
Same	12-11-43	12- 8-43	15	8.00	120.00	7.60	114.00	6.00
Same	12-17-43	12-15-43	46	8.00	368.00	7.60	349.60	18.40
Same	12-27-43	12-22-43	31½	8.00	252.00	7.60	239.40	12.60
								76.20
\$1.60 per hour was deducted as operator was furnished by lessee—does not affect the amount of the overcharge.								
#415 D-8 Cat Tractor & 2½ C4 Carryall	12- 8-43	10-20-43	12	10.60	139.20	10.60	137.20	12.00
Same	12- 8-43	10-27-43	30	11.60	348.00	10.60	318.00	30.00
								42.00
#415 D-8 Cat Tractor	12- 8-43	10-27-43	2	9.09	18.18	8.60	17.20	.98
Same	12- 8-43	11- 3-43	11	9.09	99.99	8.60	94.60	4.40
								5.38
\$1.60 per hour was deducted as operator was furnished by lessee—does not affect the amount of the overcharge.								
#410 D-8 Cat Tractor	12- 8-43	11- 3-43	26½	9.09	240.89	8.60	227.90	12.99
Same	12- 8-43	11-10-43	72½	9.09	657.03	8.60	623.50	33.53
Same	12- 8-43	11-17-43	45½	9.09	413.60	8.60	391.30	22.30
Same	12- 8-43	11-24-43	42	9.09	381.78	8.60	361.20	20.58
Same	12- 8-43	12- 1-43	45½	9.09	413.60	8.60	391.30	22.30
Same	12-11-43	12- 8-43	25	9.09	227.25	8.60	215.00	12.25
Same	12-17-43	12-15-43	59½	9.09	540.86	8.60	511.70	29.16
Same	12-27-43	12-22-43	25½	9.09	231.80	8.60	219.30	12.50
								165.61
#601 Austin Western Grader 99M	6-10-43	May	211½	6.40	1353.60	7.60—1.60=6.00	1269.90	84.60
Same	7-23-43	June	260	6.40	1664.00	7.60—1.60=6.00	1560.00	104.00
Same	8-20-43	{ July } { Aug. }	219½	6.40	1404.80	7.60—1.60=6.00	1317.00	87.80
Same	11- 4-43	Oct.	124	8.00	992.00	7.60	942.40	49.60
								326.00

[Printer's Note]: Adding machine tape figures attached: 76.20* 42.00 5.38 165.61 326.00 Total 615.19*

DEFENDANT'S PRE-TRIAL AND TRIAL EXHIBIT No. 8

Address All Mail: Route 7 - Box 949

KUCKENBERG CONSTRUCTION CO.

General Contractors

Portland, 16, Oregon

Phone WEBster 2259

11104 N. E. Holman St.

Sold To A. J. Goerig Construction Company
Lloyd Building, Seattle, Washington

Date

Ship To

Your Number

Terms: Net Cash

Our Order

COST SUMMARY

A. J. Goerig Construction Co., Bremerton Airport
Rental of Equipment

	Unusual Repairs	Ordinary Mainte- nance & Repairs	Operation	Total Cost of Contract
Total Payrolls for Labor, Bremerton	2,120.14	4,568.24	15,360.28	22,057.66
Total Payrolls for Labor, Portland	5,173.14	19,869.16		25,042.30
Total Repair Part, Bremerton and Portland	25,436.86	8,933.54		34,370.40
Total Gas, Oil, etc.			3,752.90	3,752.90
Total Freight, Hauling Eqpmt.			4,807.48	4,807.48
Total Indust. Ins., Social Sec., etc.	822.49			822.49
Total Miscel. Ex- penses at Brem- erton		379.42		379.42
	<u>33,552.63</u>	<u>33,750.36</u>	<u>23,929.66</u>	<u>90,853.23</u>
O.P.A. Bare Rentals				\$46,810.78

DEFENDANT'S PRE-TRIAL AND TRIAL EXHIBIT No. 9

Address All Mail: Route 7 - Box 949

KUCKENBERG CONSTRUCTION CO.

General Contractors

Portland, 16, Oregon

Phone WEBster 2259

11104 N. E. Holman St.

Sold To

Date

Ship To

Your Number

Terms: Net Cash

Our Order

PORTLAND PAY ROLL TOTALS

December 12, 1942 to June 19, 1943

Week Ending	Amount	Week Ending	Amount
12/12/42	487.14	4/10/43	1,089.35
12/19/42	1,022.40	4/17/43	1,359.85
12/26/42	877.29	4/24/43	1,728.67
1/ 2/43	549.88	5/ 1/43	1,238.37
1/ 9/43	525.65	5/ 8/43	1,025.02
1/16/43	742.39	5/15/43	963.63
1/23/43	688.47	5/22/43	1,027.13
1/30/43	667.28	5/29/43	1,024.16
2/ 6/43	818.23	6/ 5/43	909.64
2/13/43	636.75	6/12/43	836.84
2/20/43	667.75	6/19/43	831.85
2/27/43	1,012.82		
3/ 6/43	538.31	Total	\$25,042.30
3/13/43	521.15		
3/20/43	701.30		
3/27/43	1,070.73		
4/ 3/43	1,480.25		

DEFENDANT'S PRE-TRIAL AND TRIAL EXHIBIT No. 10

KUCKENBERG CONSTRUCTION CO.

General Contractors

Portland, Oregon

Phone WEBster 2259 11104 N. E. Holman St.

Date April 30, 1943

Sold To A. J. Goerig Construction Company
Lloyd Building, Seattle, Washington

Ship To Your Number
Terms: Net Cash. Net Our Order

Hauling Charges

Interstate Heavy Hauling	\$1,106.09
Jones Heavy Hauling	292.58
St. Johns Motor Express Co.....	324.36
Kuckenberg Construction Co.	218.77
Kuckenberg Construction Co., (#12 Road Patrol)	139.77
Interstate Heavy Hauling Company,	
Invoice No. 4898	183.13
Invoice No. 4883	92.70
Invoice No. 4897	610.79
Invoice No. 4895	253.58
Jones Hauling Company dated April 12, 1943.....	502.05
Kuckenberg Construction Company	
dated April 13, 1943	943.89
dated April 13, 1943	139.77
	<hr/>
	\$4,807.48

DEFENDANT'S PRE-TRIAL AND TRIAL EXHIBIT No. 11

Address All Mail: Route 7 - Box 949

KUCKENBERG CONSTRUCTION CO.

General Contractors

Portland, 16, Oregon

Phone WEBster 2259 11104 N. E. Holman St.

Sold To

Date

Ship to

Your Number

Terms: Net Cash

Our Order

SUMMARY OF INVOICES

Date	Description	Misc.	Repairs	Gas, Oil & Grease
Dec.	Union Oil Company.....			395.44
Jan.	" " "			794.95
Feb.	" " "			687.02
March	" " "			1481.90
April	" " "			393.59
4/43	Fred M. Viles.....		123.68	
2/43	Woolach Brothers		230.00	
2/43	Air Reducation Sales Co.		17.46	
3/43	" " "		6.07	
3/43	" " "		12.93	
2/28/43	Expenses	88.51		
4/9/43	"	42.73		
2/9/43	"	12.02		
4/43	"	82.89		
1/43	"	17.52		
3/43	"	18.48		
3/43	"	117.27		
4/30/43	Western Tractor & Equipment Co.		91.48	
3/31/43	" "		793.87	
2/27/43	" "		605.99	
1/43	" "		121.33	
12/42	Pacific Mach & Tool Steel Co.		41.32	
4/43	Tracey & Co. ....		.25	
5/43	Francis Motor Car Co.....		60.23	
4/43	J. E. Haseltine		65.00	
4/23/43	Walling Tractor Co.		181.09	

Summary of Invoices—(Continued)

Date	Description	Misc.	Repairs	Gas, Oil & Grease
3/43	Bearing Sales & Service....		62.52	
3/43	“ “ “		56.12	
4/43	“ “ “		9.61	
4/43	Hofius-Ferris		290.15	
12/42	Kuckenberg Const. Co.....		668.96	
12/26/42	“ “		4382.77	
12/27/42	“ “		1762.38	
1/8/43	“ “		306.20	
1/1/43	“ “		374.93	
1/12/43	“ “		2592.00	
2/43	“ “		256.19	
2/43	“ “		2417.43	
2/43	“ “		638.08	
3/43	“ “		3135.12	
3/43	“ “		1936.75	
3/43	“ “		960.00	
4/43	“ “		543.08	
1/43	Interstate Tractor & Equipment Co.		37.75	
1/43	“ “		109.39	
1/8/43	“ “		19.15	
1/8/43	“ “		540.00	
1/14/43	“ “		205.23	
1/12/43	“ “		890.80	
3/17/43	“ “		790.99	
3/17/43	“ “		883.10	
3/15/43	“ “		5.82	
3/15/43	“ “		26.58	
3/26/43	“ “		1350.00	
3/26/43	“ “		114.18	
3/24/43	“ “		1826.80	
4/1/43	“ “		13.76	
4/6/43	“ “ .....		.39	
4/6/43	“ “		182.80	
4/6/43	“ “ .....		.72	
4/6/43	“ “ .....		.72	
4/6/43	“ “ .....		.32	
4/5/43	“ “		2.22	
4/5/43	“ “		46.70	
4/13/43	“ “		3.12	
4/15/43	“ “		37.78	

Summary of Invoices—(Continued)

Date	Description	Misc.	Repairs	Gas, Oil & Grease
4/14/43	Interstate Tractor Co. Equipment Co.		258.10	
4/12/43	“ “		5.92	
4/15/43	“ “		27.15	
4/15/43	“ “		540.00	
4/21/43	“ “		327.60	
4/30/43	“ “		88.00	
5/3/43	“ “		7.98	
5/3/43	“ “ .....		.48	
5/3/43	“ “		704.00	
5/3/43	“ “		536.14	
5/4/43	“ “		1.12	
5/7/43	“ “		238.12	
5/7/43	“ “		217.90	
5/11/43	“ “		90.63	
5/12/43	“ “		28.29	
5/12/43	“ “		207.04	
5/14/43	“ “		26.49	
5/14/43	“ “		4.68	
5/14/43	“ “		72.28	
5/17/43	“ “		5.34	
5/18/43	“ “		1.32	
5/17/43	“ “		24.72	
5/20/43	“ “		423.07	
5/20/43	“ “		149.96	
5/24/43	“ “		227.08	
5/20/43	“ “		2.70	
5/24/43	“ “		18.92	
5/25/43	“ “		2.05	
5/25/43	“ “		8.10	
6/4/43	“ “		157.14	
6/2/43	“ “ .....		.24	
6/3/43	“ “		3.45	
6/3/43	“ “ .....		.32	
6/3/43	“ “		14.21	
6/3/43	“ “		1.45	
6/3/43	“ “		13.95	
6/3/43	“ “		21.03	
3/3/43	Harvey V. Lombard.....		4.12	
12/14/42	Kuckenberg Const. Co.....		78.00	
		\$379.42	\$34,370.40	\$3,752.90

DEFENDANTS' PRE-TRIAL AND TRIAL
EXHIBIT No. 12

Prentiss M. Brown, Price Administrator,
McDannel Brown, Chief Enforcement Attorney,
Office of Price Administration

The undersigned, Henry A. Kuckenberg, hereby advises you that he refuses to answer any questions or to produce any documents or other evidence concerning rental of construction and road maintenance equipment, on the ground that the answers to said questions or the production of such documents or other evidence may tend to incriminate him or subject him to a penalty or forfeiture.

Dated October 19, 1943.

HENRY A. KUCKENBERG

DEFENDANTS' PRE-TRIAL AND TRIAL
EXHIBIT No. 13

Chester Bowles, Administrator of the Office of Price
Administration

McDannel Brown, Chief Enforcement Attorney
Office of Price Administration

The undersigned, Harriet A. Kuckenberg, hereby advises you that she refuses to answer any questions or to produce any documents or other evidence concerning rental of construction and road maintenance equipment, on the ground that the answers to said questions or the production of such documents or other evidence may tend to incriminate her or Kuck-

enberg Construction Company, a co-partnership, or subject her or said Kuckenberg Construction Company to a penalty or forfeiture.

Dated January 6, 1944.

HARRIET A. KUCKENBERG

DEFENDANTS' PRE-TRIAL AND TRIAL
EXHIBIT NO. 14

Chester Bowles, Administrator of the
Office of Price Administration

McDannel Brown, Chief Enforcement Attorney
Office of Price Administration

The undersigned, Henry A. Kuckenberg, hereby advises you that he refuses to answer any questions or to produce any documents or other evidence concerning rental of construction and road maintenance equipment, on the ground that the answers to said questions or the production of such documents or other evidence may tend to incriminate him or Kuckenberg Construction Company, a co-partnership, or subject him or said Kuckenberg Construction Company to a penalty or forfeiture.

Dated January 6, 1944.

HENRY A. KUCKENBERG

DEFENDANTS' PRE-TRIAL AND TRIAL
EXHIBIT NO. 15

Kuckenberg Construction Co.

General Contractor

11104 Northeast Holman Street

Bus. Phone WE 2259

Portland, Oregon

May 5, 1944

Mr. Walter Shoemaker,
Office of Price Administration
Rm 6225, Federal Office Building #1
Washington, D. C.

Refer to: 694:2:PEA

MPR 134

Dear Sir:

With reference to your letter of February 5, 1943, wherein you state that your office will not object to our using a rate of \$3.50 per hour for Motor Grader Diesel Heavy Duty, and Motor Grader Diesel all wheel drive and steer with attachments, you state that this rate has been arrived at after careful consideration of the cost data submitted, together with information which your office has obtained from many other lessors of similar equipment.

On February 10, 1943, Porter W. Yett of this city submitted identical cost data covering a Patrol Grader Caterpillar 18,550 lb. Diesel powered pneumatic tire, and on February 23, 1943, you allowed a rate of \$4.40 per operating hour.

On March 9, 1943, United Contracting Co. of this city submitted data covering a Western Austin Blade No. 77, and on March 31, 1943, you allowed \$4.40.

It may be that the information that we submitted in our letter of February 5, 1943, did not sufficiently describe the equipment. The equipment described in our letter as Motor Grader Diesel Heavy Duty is in fact a Caterpillar Model 12, approximately 22,700 lb. with heavy duty scarifier and lights. The Caterpillar Patrol Grader described by Porter W. Yett is a Model 11 Caterpillar, which is a smaller machine.

The Motor Grader Diesel all wheel drive and steer with attachments described in our letter of February 5, 1943, is an Austin Western 99M, which is a larger machine than the Austin Western 77 on which you allowed \$4.40 to United Constructing Co.

Under these circumstances and with this additional information we feel that we should be entitled to at least \$4.40 per hour on these two machines and can see no reason why we should be allowed \$3.50 when these other machines are allowed \$4.40, especially upon identical cost data. Both these machines we are writing you about belonging to Porter W. Yett and United Contracting Co. were used on the same jobs our graders were used on, doing the identical work, so we cannot understand why there should be this difference in rates. We would appreciate it if you would grant us at least the same rate of \$4.40 that you granted these other people.

Very truly yours,

KUCKENBERG CONSTRUCTION CO.

HK:jm

HENRY KUCKENBERG
Partner.

DEFENDANTS' PRE-TRIAL AND TRIAL
EXHIBIT NO. 16

Kuckenberg Construction Co.
General Contractors
11104 Northeast Holman Street

Bus. Phone: WE 2259

Portland, Oregon
May 19, 1944

Mr. Walter Shoemaker
Office of Price Administration
Rm 6225, Federal Office Building #1
Washington, D. C.

Refer to: 694:2:PEA
MPR 134

Dear Sir:

We have not heard from you in answer to our letter to you of May 5, 1944.

We had intended that this letter of May 5, 1944, should be a further report pursuant to the provisions of Section 1399.6 (2) (b), that is to say, a recomputation in accordance with the requirements of Paragraph (2) (b) providing for a price bearing a normal relation to the maximum price of a competitive supplier of the same or similar service, so that final settlement could be made in accordance with your action upon this request.

If this was not made sufficiently clear in the letter of May 5, would you kindly consider this

letter a part of said letter of May 5 and treat the letter of May 5 accordingly?

Yours very truly,

KUCKENBERG CONSTRUCTION CO.

HK:jm

HENRY KUCKENBERG
Partner

DEFENDANTS' PRE-TRIAL AND TRIAL
EXHIBIT NO. 17

Office of Price Administration
Washington, D. C.

6203 Federal Office Building No. 1

Registered Mail—Return Receipt Requested

May 24, 1944

Kuckenberg Construction Company
11104 Northeast Holman Street
Portland, Oregon

Attention: Mr. Henry Kuckenberg, Partner
In reply refer to: 694:2:BZ

Gentlemen:

This is in reply to your letter of May 15, 1944 in reference to the rates suggested by this Office for your Diesel Motor Graders—\$3.50 per hour for a Diesel Heavy Duty and for a Diesel All Wheel Drive and Steer.

This Office, at one time, did approve for several lessors, an operating service rate of \$4.40 per hour for a Heavy Duty Diesel Grader; however, we now

consider this rate excessive. We are contacting all contractors who have been allowed a similar rate and are suggesting a lower rate which is more in line with the average of operating costs submitted by lessors from various parts of the country. (Porter W. Yett was advised of the lower rate in our letter to him of April 15, 1944).

Accordingly, this Office disapproves the rate of \$4.40 per hour and suggests and will have no objection to the following maximum operating service rates:

Diesel Grader—All Wheel Drive and Steer, \$3.55 per hour

Diesel Grader—Heavy Duty (Caterpillar Model 12), \$3.75 per hour

These rates cover all costs due to operation and maintenance.

In regard to rentals on a fully operated basis, the maximum rates are those suggested in our letter to you of March 25, 1944 (to cover bare rental and operation and maintenance):

Model 99M Austin Western Diesel Motor Grader
\$6.45 per hour

Model 12 Caterpillar Diesel Motor Grader \$6.40
per hour

Very truly yours,

WALTER SHOEMAKER

WALTER SHOEMAKER,

Head Construction and Ex-
traction Equipment Section
Machinery Branch

DEFENDANTS' PRE-TRIAL AND TRIAL
EXHIBIT NO. 18Kuckenbergl Construction Co.
General Contractors
11104 Northeast Holman StreetBus. Phone: WE 2259
via Registered MailPortland, Oregon
June 1, 1944Mr. Walter Shoemaker, Head
Construction and Extraction
Equipment Section, Machinery Branch,
Office of Price Administration
6203 Federal Office Bldg., No. 1
Washington, D. C.

Re: 694:2:BZ

Dear Sir:

We are in receipt of your letter of May 24, 1944, which is in reply to our letter of May 15, 1944.

In your letter of May 24, 1944, you admit that you did approve an operating service rate of \$4.40 per hour for a heavy duty Diesel Grader for several lessors and you state that you now consider this rate excessive. However, this does not cover the situation which has resulted by reason of these differences in the allowance granted. Our rate of \$3.50 was granted in a letter dated February 5, 1943 and the other higher rates were granted at approximately the same time.

The lessors who were granted the higher rates were operating their equipment on the identical job we were operating on and were receiving and entitled to receive the sum of \$4.40 per hour for

their similar equipment, whereas we would be entitled to receive only \$3.50 per hour under your allowance on the same job for similar equipment. Your reduction of the rate of these other lessors is not retroactive and does not cancel out their right to charge these rates during the time previous to your cancellation, so that these other lessors still are permitted to charge \$4.40 during the period that we are still restricted to a lower rate.

Section 139916 (2) (b) (1) of MPR 134, Amendment No. 3, provides that the charge shall result in a price bearing a normal relation to the maximum price of a competitive supplier of the same or similar service. We feel that in all fairness to us you should allow us a rate of \$4.40 per hour up to the time that the rate to competitive suppliers was cut down. In view of this provision of the Regulation, why should there be this discrimination against us covering that period of time? Why should we be required to rent at \$3.50 per hour when the other lessors working along side of us on the same job are allowed by you to charge \$4.40 per hour? We cannot see why you should object to permitting us to charge the same price for our equipment during this period regardless of what you are doing now. We feel that any other procedure would be a discrimination against us which we cannot understand, and we feel that it does not conform to the Regulation itself since the Regulation does not contemplate a lower price for one supplier of the same or similar service than another. We feel this all the more keenly since our equipment

on this job was larger equipemnt than the ones you allowed the \$4.40 rate to and performed more work and cost more to operate.

We feel that in all fairness your letter of February 5, 1943, should be amended to provide for a rate of \$4.40 per hour instead of \$3.50 per hour, and that the \$4.40 per hour rate should apply up to the time that you reduced the rates to the other lessors. Would you kindly advise if you would be willing to do this.

Yours very truly,

KUCKENBERG

CONSTRUCTION CO.

By.....

Partner.

Defendant's Pre-Trial Exhibit 19 A

February 10, 1943

Office of Price Administration
Washington, D. C.

Construction & Road Maintenance Equipment Section

Gentlemen:

We wish to file the following rental prices on our Patrol graders,
Caterpillar 18,550 Lb., Diesel powered, Pneumatic tired:

240 Hour Basis

\$1.78 per hour for bare equipment, power patrol blade

\$1.86 per hour for labor (operator), insurance, Etc.

\$.90 per hour for diesel, oil, grease and other lubricant

\$3.46 per hour for repairs and maintenance, service and supervision

\$6.00 per hour Total

Very truly yours,

PORTER W. YETT

By Asst. Mgr.

Monthly
240 | 525
480
450
240
2100
1920
180

2.18
4.40

Weekly
48 | 173.
360
144
290
288
2

2.60
4.40
6.00

Daily
8 | 42
5.25
4.40
9.65

240 | 17
1680
240
1680
240
240

DEFENDANTS' PRE-TRIAL AND TRIAL
EXHIBIT 19-B

Office of Price Administration
Washington, D. C.
Federal Office Building No. 1
Room 6225

Feb. 23, 1943

In reply refer to: 694:2:RJC

Porter W. Yett
6500 N. E. Ainsworth Street
Portland, Oregon

Attention: Mr. Porter W. Yett

Gentlemen:

Reference is made to your letter, dated February 10, 1943, relative to your submission of a rental price for your Caterpillar, Diesel Patrol Graders, pneumatic tires, weight 18,550 Lbs.

In connection with your total rental price it will be necessary to invoice bare rentals and service charges separately (Section 1399.7 of Maximum Price Regulation 134). The bare rental shall be computed in accordance with the rate listed in Appendix A, and the provisions of Section 1399.2 and 1399.3 of Maximum Price Regulation 134.

This Office must disapprove the rate suggested by you but will not object to charge of \$4.40 per operating hour to cover operator, fuel, lubrication, repairs (except those due to normal wear and tear) insurance, overhead and any other costs directly chargeable to operation and maintenance.

The above rate may be added to the bare rental of the foregoing equipment.

Very truly yours,

WALTER SHOEMAKER

WALTER SHOEMAKER,

Head Construction and Ex-
traction Equipment Section
Machinery Branch

DEFENDANTS' PRE-TRIAL AND TRIAL
EXHIBIT 19-C

Office of Price Administration

Washington, D. C.

Federal Office Building No. 1

Room 6225

Feb. 27, 1943

In reply refer to: 694:2:NEA

MPR 134

The United Contracting Company

311 Stock Exchange Building

Portland, Oregon

Attention: Mr. M. J. Lynch, Secy. and
Treas.

Gentlemen:

We have received your letter of February 16, 1943, in which you report a rental agreement with the Kaiser Company of Vancouver, Washington, which provides for a rental of one Model No. 77

Austin Western motor grader for 100 hours at \$7.60 per hour fully operated.

Maximum Price Regulation No. 134 does not provide for a fully operated contract. Section 1399.7 of this Regulation provides that lessors must bill separately bare rentals and operating and maintenance charges which have been established with this Office. Since you did not have a service rate in effect on March 31, 1942, the Regulation requires that you submit to this Office a detailed statement of the services you are performing and of the cost of each service, basing these costs upon wages and prices prevailing on March 31, 1942.

Your letter does not state whether the motor grader is gasoline or Diesel. Assuming that it is a Diesel, this Office will not object to your charging a rate of \$4.40 per operating to cover the services of operator, fuel, lubrication and repairs other than normal wear and tear. You may use this rate pending a receipt by this Office of additional information concerning the services rendered and their costs.

This rate is based upon a straight time work week, and you may bill separately actual overtime wages to the extent that this practice was followed during March, 1942, and is based upon wages prevailing on that date.

With respect to the bare rental, we must ask you not to exceed the maximum charges as set forth

in Appendix A and calculated in accordance with Sections 1399.2 and 1399.3 of this Regulation.

Very truly yours,

WALTER SHOEMAKER

WALTER SHOEMAKER,

Head Construction and Ex-
traction Equipment Section
Machinery Branch

cc: Kaiser Co., Inc.

Vancouver, Washington

DEFENDANTS' PRE-TRIAL AND TRIAL
EXHIBIT 19-D

March 9th—1943.

Office of Price Administration,
Federal Office Building, No. 1—Room 6225,
Mr. Walter Shoemaker, Head Construction and
Extraction Equipment Section
Machinery Branch,
Washington, D. C.

Gentlemen:—

Re File No. 694-2-PEA-MPR 134.

Thank you for your letter of February 27th. Neglected to state in our previous letter that this machine—Western Austin Blade No. 77 is gasoline operated. This machine was rented by Kaiser Company, Shipyard, Vancouver, Washington, and is as much the use of same was less than 240 hrs. per

month and less than 7 days per week, the rental of same will be on the daily basis.

We figure the cost of same as follows:—

Per Day Rate	\$4.875	Per Hour
Operator time	1.60	" "
Gas-oil-ins. repairs etc.	1.125	" "

Rental charge\$7.60 per hour

In addition to the above we pay the operator when he works over and above the forty hours and time over the eight hours—\$2.40 per hour. The cost of repairs we do not know until the machine is returned to our shops for repair work. We can figure the exact cost of the gasoline and oils—as well as grease. Prior to the above time we have never rented a blade.

We trust the above will completely answer your letter.

Very truly yours,

UNITED CONTRACTING
COMPANY

By M. J. LYNCH

Secy. Treas.

cc: Kaiser Co. Inc.

Vancouver, Wash.

DEFENDANTS' PRE-TRIAL AND TRIAL
EXHIBIT NO. 19-E

Office of Price Administration

Washington, D. C.

Federal Office Building No. 1

Room 6225

Mar. 31, 1943

In reply refer to: 694:2:RJC

Rec. Apr. 5, 1943

The United Contracting Company

311 Stock Exchange Building

Portland, Oregon

Attention: M. J. Lynch, Sec. Treas.

Gentlemen:

This will acknowledge receipt of your letter dated March 9, 1943, submitting cost data in connection with your Western Austin Blade No. 77 which you have rented on a fully operated basis.

In view of your statement that this equipment is rented intermittently, and never for a full week at a time, this Office will have no objection to your renting it on an hourly basis, at a fully operated rate of \$7.60 per hour. However as stated in our letter of February 27, 1943, it will be necessary to invoice your bare rental and operating service charges separately (Section 1399.7 of Maximum Price Regulation 134). The bare rental, however billed, must not exceed the daily, weekly or monthly rate, whichever is applicable. This is in accordance with Sections 1399.2 and 1399.3 of Maximum Price Regulation 134.

We also have no objection to an operating service rate of \$4.40 per hour to cover operator, fuel, lubrication, repairs (except those due to normal wear and tear) insurance, overhead and any other costs directly chargeable to operation and maintenance.

In connection with overtime pay which you refer to in the last paragraph of your letter please refer to fourth paragraph of our letter of February 27, 1943.

Very truly yours,

WALTER SHOEMAKER

WALTER SHOEMAKER,

Head Construction and Ex-
traction Equipment Section
Machinery Branch

Copy sent to Kaiser Co. Apr. 5, 1943.

**DEFENDANTS' PRE-TRIAL AND TRIAL
EXHIBIT NO. 20-A AND B**

May 11, 1943

Office of Price Administration
Washington, D. C.

Gentlemen:—

I own a tractor with Bulldozer and Gas shovel which I rent on a fully operated basis. I recently learned that Maximum Price Regulation 134 requires me to file a list of my charges with your office to obtain approval thereof. Although I figure my charges, mostly on an hourly basis, I am gen-

erally doing a specific or separate job like I was a contractor. I have been trying to figure out for quite a while, how to comply with your regulations and have finally decided the best way was to set forth in detail the manner in which I do business.

The tractor I own is an Allis-Chalmers 50 HP diesel, Model WKO, equiped with a Baker hydraulic bulldozer. My power shovel is a Bucyrus Erie, Model 10-B, $\frac{3}{8}$ C.Yd with gasoline engine. With the exception of one shovel that was in Hood River, 25 miles from here, this bulldozer and shovel are the only ones available for rental within a radius of at least 50 to 75 miles of The Dalles. The only work I get are the smaller odd jobs for the farmers, small loggers, occasional emergency work for the Union Pacific or other Industrial concerns operating through here. I had some work last year from a big contractor but not much since then. The jobs are all small, with considerable expense moving from one to the other, as most of them only last two or three days and seldom more than ten days.

Although this equipment is rarely busy during the winter months, it has generally been fairly busy during the rest of the year. However, to keep my operators, I have to hire them on a year around basis. They help maintain the equipment, doing the repair work and all the greasing to the best of their mechanical ability. The actual productive hours do not work out so good with my present help but it is the best I can do. Also, my supervisory costs are high, for the reason that either myself or General Foreman of my gravel business

have to look over and help plan out most of the jobs before we get them. My customers usually only know in a general way what they want done and we lay out the job and estimate how long it will take. We can not figure on a yardage basis, because they do not know or have it figured out that way. One of us must stay around the job a good part of the day to see that the work is being carried out as originally discussed. Many of the jobs are in out of the way places, away from telephones or good roads, so that we have to keep checking up, to give any assistance or see what might be needed. Since everything is temporary, we have to take fuel and supplies out daily.

I only rent the bull dozer and shovel on a fully operated basis. I was charging a straight \$7.00 per hour in March of 1942. I have never made a separate charge for operating and another for the equipment alone. In fact, I have delayed writing this letter for a month or so, trying to figure them out separately but without much success. All I can do is estimate that \$5.00 an hour is a reasonable charge for the operator, fuel, oil, greasing, oiling, repairs, insurance, taxes, supervision and miscellaneous overhead. The operating costs run higher when the job is very far from The Dalles, as we have to pay the Operators mileage for their cars as well as extra time going to and from the job, also their meals and other extra expenses.

If I made one charge for this equipment and another charge for all the operation, maintenance and supervision detail, then most of the time on all

these short jobs the charge would be a great deal higher than \$7.00 an hour. Then I never would get through explaining to my customers how much the charges might be or how I had finally charged afterwards. I only charge for the actual time the machines are operating and many of the customers watch the time plenty close.

I will appreciate it if you will let me continue to operate my equipment the way I have been, for \$7.00 per hour.

Very truly yours

MID-COLUMBIA SAND
& GRAVEL

DEFENDANT'S PRE-TRIAL AND TRIAL
EXHIBIT No. 20-C AND D

[Marginal Note in pencil]: Public Roads
Admin. F. S. Metzger, Pur. Agent. Telephone Port-
land At 6171. Room 327.

Office of Price Administration

Washington, D. C.

Federal Office Building No. 1

Room 6225

In reply refer to; 694:2RJC

May 27, 1943

Mid-City Columbia Sand & Gravel

The Dalles

Oregon

Attention Mr. Wm. N. Dielschneider

Gentlemen:

Reference is made to your letter dated May 11,

1943, submitting for approval your dully operated charges for certain equipment.

Although your rental prices were in effect March 31, 1942, they were on a fully operated basis, combining rental and maintenance plus the hourly charge for operating labor. Section 1399.6 of Maximum Price Regulation 134 states' . . . "If on March 31, 1942, however, a lessor leased construction or road maintenance equipment on a 'fully operated' or similar basis and also on a 'bare' basis, the established charge in effect on March 31, 1942 for the operating or maintenance services provided in the contract for such equipment on the 'fully operated' or similar basis, when supplied in connection with the rental of such equipment, shall be the difference between the 'rental' price in effect on March 31, 1942, of such equipment on the 'Fully operated' or similar basis and on the 'bare' basis." Inasmuch as you were not renting on a 'bare basis' on March 31, 1942, the foregoing Section of Maximum Price Regulation 134 cannot be applied.

(1 * * * omitted because)

*This Office cannot approve the rates as submitted, but will have no objection to the following operating service rates per operating hour for the equipment listed:

Item	Hourly Operating Rate
Model WKO-Allis-Chalmers tractor with bulldozer	\$3.25
3/8 yd. gasoline shovel (model 10-B-Bucyrus-Erie)..	4.50

The foregoing rates cover operator, oiler (where required), fuel, lubrication, repairs (except those

due to normal wear and tear), insurance, overhead and any other costs directly chargeable to operation and maintenance. These rates are based on straight time; charges for any actual overtime wages for operating personnel may be added, such charges to be computed on the basis of overtime wage rates in effect March 31, 1942. To the operating service rates listed above you may add the applicable bare rental rates in accordance with Maximum Price Regulation 134.

With respect to supervision, this Office has taken the position that such service should not be charged to the equipment, but rather may be separately billed, if the lessee requires the services of a supervisor in connection with the work performed by the equipment.

In connection with the costs of car mileage, meals, and running time (to and from jobs) of your operators, such charges should be invoiced separately and be a matter of mutual agreement between lessor and lessee.

Very truly yours,

WALTER SHOEMAKER

Walter Shoemaker,

Head Construction and Ex-
traction Equipment Sec-
tion Machinery Branch.

DEFENDANT'S PRE-TRIAL AND TRIAL
EXHIBIT No. 20-E
L.1931

1137 Nichols Blvd.
Longview, Washington

April 16, 1943

Office of Price Administration
Washington, D. C.

Gentlemen:

Attached is a list of the rental rates charged on my six pieces of equipment, all being used on War Construction Projects.

These prices are based on my furnishing the equipment, operator or operators, oil, grease, maintenance, transportation, etc.

Under the heading (5) as listed on the "Break-down on Monthly Charges", I have included the following: Two mechanic's salaries; two pick-up trucks and one truck with machinery trailer, all furnished by me. The equipment listed is rented as mentioned with everything furnished. The two mechanics run, service and keep these units supplied with fuel, grease, etc., in addition to keeping them in good repair. It is necessary that I furnish each of these men with a pick-up truck. The large machinery truck and trailer is also maintained at my expense. It is extremely essential that all of this expense be divided somewhat proportionately to each unit in order for me to show any profit upon my equipment and for my work.

The prices which I am charging for rental on my equipment were in effect on and before March

1942; in fact, these rates have been charged for the past four years on my equipment.

In one or two instances I have rented a unit or two without furnishing any of the services just mentioned, and on such jobs I have charged the rental rates in accordance with the O.P.A. maximum rental rates.

Hoping that these rates will meet with your approval in every respect, and with an outlook to a favorable reply from you, I remain

Yours very truly,

RALPH R. GAY

RRG:EC

DEFENDANT'S PRE-TRIAL AND TRIAL EXHIBIT No. 20-F

RENTAL RATES:

T-20 International 26 H.P. Gas Tractor and

Angle Dozer	\$ 4.50 per hr.
8 hrs. per day @ \$4.50 per hr.....	36.00 per day
6 days per week @ 36.00 per day.....	216.00 per week
4 weeks per month @ \$216.00 per week.....	864.00 per month

BREAKDOWN ON MONTHLY CHARGES:

1. T-20 and equipment—O.P.A. Rental Allowance.....	\$305.00
2. Operation furnished by owner @ \$1.60 per hr. straight time—time and one half overtime.....	332.80
3. Gasoline fuel per month	80.00
4. Oil and Grease	18.00
5. Maintenance, Transportation, Taxes and Insurance....	128.20
	<hr/>
	864.00
	<hr/>

DEFENDANT'S PRE-TRIAL AND TRIAL EXHIBIT No. 20-G

RENTAL RATES:

T-6 International 30 H.P. Gas Tractor, straight		
dozer and hoist	\$	5.00 per hr.
8 hrs. per day @ \$5.00 per hr.....		40.00 per day
6 days per week @ \$40.00 per day.....		240.00 per week
4 weeks per month @ \$240.00 per week.....		960.00 per month

BREAKDOWN ON MONTHLY CHARGES:

1. T-6 and equipment—O.P.A. Rental Allowance.....	\$358.00
2. Operator furnished by owner @ \$1.60 per hr. straight time—time and one half overtime.....	332.80
3. Gasoline fuel per month	85.00
4. Oil and Grease	18.00
5. Maintenance, Transportation, Taxes and Insurance....	166.20
	960.00

DEFENDANT'S PRE-TRIAL AND TRIAL EXHIBIT No. 20-H

RENTAL RATES:

TD-9 International 39 H.P. Diesel Tractor, Angle		
Dozer and Hoist	\$	6.00 per hr.
8 hrs. per day @ \$6.00 per hr.....		48.00 per day
6 days per week @ \$48.00 per day.....		288.00 per week
4 weeks per month @ \$288.00 per week.....		1152.00 per month

BREAKDOWN ON MONTHLY CHARGES

1. TD-9 and equipment—O.P.A. Rental Allowance.....	\$ 510.00
2. Operator furnished by owner @ \$1.60 per hr. straight time—time and one half overtime.....	332.80
3. Diesel fuel oil per month.....	48.00
4. Oil and Grease	20.00
5. Maintenance, Transportation, Taxes and Insurance	241.20
	\$1152.00

DEFENDANT'S PRE-TRIAL AND TRIAL EXHIBIT No. 20-I

RENTAL RATES:

TD-14 International 54 H.P. Diesel Tractor,

Angle Dozer and Hoist	\$ 7.00 per hr.
8 hrs. per day @ \$7.00 per hr.....	56.00 per day
6 days per week @ \$56.00 per day.....	336.00 per week
4 weeks per month @ \$336.00 per week.....	<u>1344.00 per month</u>

BREAKDOWN ON MONTHLY CHARGE:

1. TD-14 and equipment—O.P.A. Rental Allowance....	\$ 700.00
2. Operator furnished by owner @ \$1.60 per hr. straight time—time and one half overtime.....	332.80
3. Diesel fuel oil per month	55.00
4. Oil and Grease	25.00
5. Maintenance, Transportation, Taxes and Insurance..	231.20
	<u><u>\$1344.00</u></u>

DEFENDANT'S PRE-TRIAL AND TRIAL EXHIBIT No. 20-J

RENTAL RATES:

LS-40 Link-Belt Speeder Gas $\frac{3}{8}$ cu. yd.

Shovel	\$ 7.00 per hr.
8 hrs. per day @ \$7.00 per hr.....	56.00 per day
6 days per week @ \$56.00 per day.....	336.00 per week
4 weeks per month @ \$336.00 per week.....	<u>1344.00 per month</u>

BREAKDOWN ON MONTHLY CHARGE:

1. LS-40 Link-Belt Speeder Shovel—O.P.A. Rental Allowance	\$ 440.00
2. Operator furnished by owner @ \$1.65 per hr. straight time and time and one half overtime.....	343.36
Oil furnished by owner @ \$1.10 per hr. straight time and time and one half overtime.....	228.80
3. Gasoline fuel per month	85.00
4. Oil and Grease per month	20.00
5. Maintenance, Transportation, Taxes & Insurance....	226.84
	<u><u>\$1344.00</u></u>

DEFENDANT'S PRE-TRIAL AND TRIAL EXHIBIT No. 20-K

RENTAL RATES:

B-5 Speeder Diesel $\frac{3}{4}$ cu. yd. Shovel.....	\$ 9.00 per hr.
8 hrs. per day @ \$9.00 per hr.....	72.00 per day
6 days per week @ \$72.00 per day.....	432.00 per week
4 weeks per month @ \$432.00 per week.....	1728.00 per month

BREAKDOWN ON MONTHLY CHARGE:

	per mo.
1. B-5 Speeder Shovel—O.P.A. Rental Allowance.....	\$ 715.00
2. Operator furnished by owner @ \$1.65 per hr.	
straight time—time and one half overtime.....	343.36
Oiler furnished by owner @ \$1.10 per hr.	
straight time—time and one half overtime.....	228.80
3. Diesel fuel oil per month.....	60.00
4. Oil and Grease	27.00
5. Maintenance, Transportation, Taxes and Insurance	353.84
	<hr/>
	\$1728.00

DEFENDANT'S PRE-TRIAL AND TRIAL EXHIBIT No. 20-L

Office of Price Administration

Washington, D. C.

Federal Office Building No. 1

Room 6225

In reply refer to: 694:2:RJC

May 7, 1943

Mr. Ralph R. Gay

1137 Nichols Boulevard

Longview, Washington

Dear Mr. Gay:

Reference is made to your letter and attached

schedule dated April 16, 1943, submitting for approval your rental rates for certain equipment.

Although your rental prices were in effect March 31, 1942, they were on a fully operated basis, combining rental and maintenance plus the hourly charge for operating labor. Section 1399.6 of Maximum price Regulation 134 states . . . " If on March 31, 1942, however, a lessor leased construction for road maintenance equipment on a 'fully operated' or similar basis and also on a 'bare' basis, the established charge in effect on March 31, 1942 for the operating or maintenance services provided in the contract for such equipment on the 'fully operated' or similar basis, when supplied in connection with the rental of such equipment, shall be the difference between the 'rental' price in effect on March 31, 1942, of such equipment on the 'fully operated' or similar basis and on the 'bare' basis." Inasmuch as you were not renting on a 'bare' basis on March 31, 1942, the foregoing Section of Maximum Price Regulation 134 cannot be applied.

This Office cannot approve the rates as submitted but will have no objection to the following operating rates per operating hour for the equipment listed:

Item	Hourly operating rate
T-20 International tractor with angledozer.....	\$ 2.35
T-6 International tractor with bulldozer and hoist....	2.50
TD-9 International tractor with angledozer and hoist	2.675
TD-14 International tractor with angledozer and hoist	2.60
LS-40 Link belt Speeder crane with $\frac{3}{8}$ yd. bucket....	3.76
B-5 Speeder with $\frac{3}{4}$ yd. bucket	4.20

The foregoing rates cover operator, oiler (where required), fuel, lubrication, repairs (except those due to normal wear and tear), insurance, overhead and any other costs directly chargeable to operation and maintenance. These rates are based on straight time; charges for any actual overtime wages for operating personnel may be added, such charges to be computed on the basis of overtime wage rates in effect March 31, 1942. To the operating service rates listed above you may add the applicable bare rental rates in accordance with Maximum Price Regulation 134.

In connection with your fully operated rates, it will be necessary to invoice your bare rental and operating service charges separately (Section 1399.7 of Maximum Price Regulation 134). The bare rental, however billed, must not exceed that computed on the daily, weekly or monthly rate, whichever is applicable. This is in accordance with Sections 1399.2 and 1399.3 of Maximum Price Regulation 134.

Very truly yours,

WALTER SHOEMAKER

Walter Shoemaker,

Head Construction and Ex-
traction Equipment Sec-
tion Machinery Branch

DEFENDANT'S PRE-TRIAL AND TRIAL
EXHIBIT No. 20-N and O

Office of Price Administration
Washington, D. C.
Federal Office Building No. 1
Room 6225

Recd. Aug. 24/43
Aug. 18, 1943

Mr. J. A. Lyons
3305 Northeast Halsey Street
Portland, Oregon

In reply refer to:694:2:RJC

Dear Mr. Lyons:

Reference is made to your letter dated August 10, 1943, submititng for approval your schedule of charges covering full maintenance and operation of certain equipment.

This Office cannot approve the rates submitted but will have no objection to the following operating service rates per operating hour for the equipment listed:

Item	Hourly operating rate
89-135 diesel tractor with power control unit and light	\$4.30
89-135 diesel tractor with bulldozer and lights.....	4.50
89-135 diesel tractor with heavy rooter	4.40
41-46 diesel tractor (with bulldozer) and lights.....	2.95
41-46 diesel tractor with double drum Hyster logging winch	3.05
41-46 diesel tractor with bulldozer and lights.....	3.10
89-135 diesel tractor with 10-13½ yd. scraper	
89-135 diesel tractor with 13½-15 yd. scraper.....	4.90
Gasoline motor grader single drive, heavy duty.....	4.20

The foregoing rates cover operator, fuel, lubrication, repairs (except those due to normal wear and tear), insurance, overhead and any other costs directly chargeable to operation and maintenance. These rates are based on straight time; charges for any actual overtime wages for operating personnel may be added, such charges to be computed on the basis of overtime wage rates in effect March 31, 1942. To the operating service charges you may add the applicable bare rental charges computed in accordance with Maximum Price Regulation 134.

Item	Hourly operating rate
$\frac{3}{4}$ cu. yd. gas dragline with lights	\$5.10
$\frac{3}{4}$ cu. yd. gas shovel with lights.....	5.70
$1\frac{1}{4}$ cu. yd. gas dragline with lights.....	6.40
$1\frac{1}{4}$ cu. yd. gas shovel with lights.....	6.40

The foregoing rates cover operator, oiler, fuel, lubrication, repairs (except those due to normal wear and tear), insurance, overhead and any other costs directly chargeable to operation and maintenance. These rates are based on straight time; charges for any actual overtime wages for operating personnel may be added, such charges to be computed on the basis of overtime wage rates in effect March 31, 1942. To the operating service charges you may add the applicable bare rental charges computed in accordance with Maximum Price Regulation 134.

It will be necessary to invoice your bare rental and operating service charges separately (Section 1399.6 of Maximum Price Regulation 134 Amendment No. 9). The bare rental, however billed, must

not exceed that computed on the daily, weekly or monthly rate, whichever is applicable. This is in accordance with Sections 1399.2 and 1399.3 of this Regulation.

Very truly yours,

WALTER SHOEMAKER

Walter Shoemaker,
Head Construction and Ex-
traction Equipment Sec-
tion Machinery Branch

Rec'd 8/24/43

DEFENDANT'S PRE-TRIAL AND TRIAL
EXHIBIT No. 20-P

J. A. Lyons

General Contractor

3305 Northeast Halsey Street

Telephone TRinity 2841

Portland, Oregon
September 24, 1943.

Mr. Walter Shoemaker,
Office of Price Administration,
Federal Office Building No. 1
Room 6225,
Washington D. C.

Refer: 694:2:RJC.

Dear Sir:

Reference is made to your letter of August 18, 1943 containing hourly operating rates for various pieces of equipment.

It is my understanding that these rates are the

maximum amounts that may be charged after July 1, 1943.

During 1942 and until July 1, 1943, much of this equipment was rented on a fully operated basis at a flat fee per hour. For example, a D8 95 h.p. Caterpillar tractor with power control unit and bulldozer was rented at \$8.50 per hour; similarly a D8 tractor with a 16 yd. Carryall Scraper was rented at \$10.00 per hour. These rates represented no increase over the March 1942 rates and were the established rates in this area at that time. However, we had no established charge for operating and maintenance service until my application was made in August of this year.

Now the question arises—Must the rates as listed in your letter of August 18 apply retroactively to rental contracts Before July 1, 1943 and most particularly to rentals before October 22, 1942??

The question arose a few days ago when the Kaiser Co., Vancouver asked for our operating charges for work done in July and August 1942.

Very truly yours,

J. A. LYONS

By

DEFENDANTS' PRE-TRIAL AND TRIAL
EXHIBIT No. 20-Q

Office of Price Administration
Washington, D. C. (25)
6225 Federal Office Building No. 1
Oct. 1, 1943

Mr. J. A. Lyons
3305 Northeast Halsey Street
Portland, Oregon

In reply refer to: 694:2:SS

Dear Mr. Lyons:

This will acknowledge your letter of September 24, 1943, in regard to your operating and maintenance charges.

We note your statement that during 1942 and until July 1, 1943, you rented equipment on a fully operated basis at a flat fee per hour. After May 11, 1942 Maximum Price Regulation No. 134 required that road maintenance and construction equipment bare rental charges for the equipment listed therein must be listed separately on invoices from operating and maintenance service charges. It was not until Maximum Price Regulation No. 134, Including Amendment No. 9, was issued on July 1, 1943, that provision was made for invoicing fully operated equipment rental at a flat hourly fee. Therefore, you were in violation of the Regulation when you rented equipment on a fully operated basis between May 11, 1942 and July 1, 1943. Further, you may not rent your equipment on a fully operated basis after July 1, 1943 without first

filing with, and obtaining the approval of, this Office for your proposed rates. (See Section 1399.6 of Maximum Price Regulation No. 134, Including Amendment No. 9).

In reply to your question in your fourth paragraph, we wish to advise you that the rates listed in our letter of August 18, 1943 apply retroactively to rental contracts entered into on and after October 22, 1942. The operating and maintenance service rates you may use prior to October 22, 1942 are those you charged, or would have charged, during March 1942, in accordance with the provisions of the General Maximum Price Regulation which governed such charges until they were incorporated into Maximum Price Regulation No. 134.

Should you have any further questions in regard to this matter, do not hesitate to write us again.

Very truly yours,

WALTER SHOEMAKER

Walter Shoemaker,

Head Construction and Ex-
traction Equipment Section
Machinery Branch

Recd. Oct. 7-43.

DEFENDANT'S PRE-TRIAL AND TRIAL EXHIBIT No. 21

KUCKENBERG CONSTRUCTION CO.

General Contractors
Portland, Oregon

Phone WEBster 2259 11104 N. E. Holman St.

Date March 9, 1944

Sold To A. J. Goerig Construction Company
Lloyd Building, Seattle, Washington

OPA Billing for Dec. 1942 to Apr. 1943

Ship To
Terms: Net Cash

Your Number
Our Order

SUMMARY OF EQUIPMENT POSSESSION BY LESSEE

For OPA Regulation #134 Rental Basis

	Possession Starts	Possession Ends
#408 Tractor & Dozer	Dec. 8, 1942	April 15, 1943
#411 Tractor & Dozer	Dec. 8, 1942	March 21, 1943
#414 or #61 Tractor & Dozer	Dec. 8, 1942	March 5, 1943
#416 or #66C Tractor & Dozer	Dec. 4, 1942	April 15, 1943
#417 Tractor & Dozer	Dec. 3, 1942	April 15, 1943
#418 Tractor & Dozer	Dec. 3, 1942	April 15, 1943
#420 Tractor & Dozer	Dec. 2, 1942	April 15, 1943
#57B Carryall—Gar Wood	Dec. 3, 1942	April 9, 1943
#61B Carryall—Le Tourneau	Dec. 3, 1942	April 15, 1943
#62B Carryall—Le Tourneau	Dec. 3, 1942	April 15, 1943
#63B—66B or W Carryall— Le Tourneau	Dec. 8, 1942	April 15, 1943
#603 Road Patrol Grader	Feb. 2, 1943	April 15, 1943
Rooter or Ripper—Woolridge, Extra Heavy Duty	Dec. 26, 1942	April 13, 1943
Light Plant—Kohler, Gasoline	Dec. 7, 1942	April 28, 1943

Defendant's Pre-Trial and Trial Exhibit
No. 21—(Continued)

[Kuckenberg Construction Co. Statement Heading]

Date March 9, 1944

Sold To A. J. Goerig Construction Company,
Lloyd Building, Seattle, Washington

OPA BILLING MPR 134

SPECIFICATIONS OF EQUIPMENT

For Kitsap County Airport, Bremerton, Washington
December 1942 to April 1943OPA Monthly Rental Rates—Maximum Price Regulation,
As Amended, October 22, 1942

Tractors #408 and #418 w/Angledozer	OPA—Reg. 134
Crawler, Diesel—89 to 130 DBHP.....	\$ 775.00 per month
4 Drum Power Unit	160.00 per month
Angledozer	175.00 per month
Generator—Lights	15.00 per month

Total—OPA Bare Equipment Rental....\$1,125.00 per month

Hourly Rate in Excess of 240 hours per mo. @ 1/480 of
\$1,125 or \$2.3437 per hr.OPA Approved Operating & Maintenance Service Rate
(2/5/43) \$4.40 per hour.

Special Contract—Excessive Wear & Tear @ \$2.00 per hour.

Possession (#408—Dec. 8, 1942 to April 15, 1943
(#418—Dec. 3, 1942 to April 15, 1943

Tractors #408 and #418 w/Scraper (Carryall)

Tractors, As Above	\$1,125.00 per month
Scraper (Carryall) w/o Power Unit.....	790.00 per month

Total—OPA Bare Equipment Rental....\$1,915.00 per month

Hourly Rate in Excess of 240 hours per mo. @ 1/480 of
\$1,915 or \$3.989 per hr.OPA Approved Operating & Maintenance Service Rate
(2/5/43) \$4.90 per hour.

Special Contract—Excessive Wear & Tear @ \$2.00 per hour.

Defendant's Pre-Trial and Trial Exhibit
No. 21—(Continued)

Specifications of Equipment—(Continued)

Tractor #411 and #414 (or 61-C) w/Bulldozers OPA—Reg. 134	
Crawler, Diesel, 89 to 130 DBHP.....	\$ 775.00 per month
4 Drum Power Unit	160.00 per month
Bulldozer	145.00 per month
Generator—Lights	15.00 per month
#414 or 61-C—	
Total OPA Bare Equipment Rental....	
\$1,095.00 per month	

Hourly Rate in Excess of 240 hours per mo. @ 1/480 of \$1,095 or \$2.28 per hr.

OPA Approved Operating & Maintenance Service Rate (2/5/43) \$4.40 per hour.

*(Tractor #411 equipped with Land Clearing Blade or Bulldozer.)

Special Contract—Excessive Wear & Tear @ \$2.00 per hour.

Possession (#411—Dec. 8, 1942 to March 21, 1943
(#414 or 61-C—Dec. 8, 1942 to March 5, 1943

Tractors #416 (or 66-C), #417 &	
#420 w/Pushdozer	
OPA—Reg. 134	
Crawler, Diesel—89 to 130 DBHP.....	\$ 775.00 per month
4 Drum Power Unit	160.00 per month
Rigid Pushdozer	25.00 per month
Generator—Lights	15.00 per month

Total—OPA Bare Equipment Rental....\$ 975.00 per month

Hourly Rate in Excess of 240 hours per mo. @ 1/480 of \$975 or \$2.03 per hr.

OPA Approved Operating & Maintenance Service Rate (2/5/43) \$4.30 per hour.

Special Contract—Excessive Wear & Tear @ \$2.00 per hour.

Possession (#416 or 66-C—Dec. 4, 1942 to April 15, 1943
(#417—Dec. 3, 1942 to April 15, 1943
(#420—Dec. 2, 1942 to April 15, 1943

Defendant's Pre-Trial and Trial Exhibit
No. 21—(Continued)

Specifications of Equipment—(Continued)

Tractors #416 (or 66-C), #417 & #420

w/Scraper (Carryalls)

Tractors #416, #417, #420, As Above.....\$ 975.00 per month

Scraper (Carryall) w/o Power Unit

16 to 20½ Cu. Yd. Struck..... 790.00 per month

Total—OPA Bare Equipment Rental....\$1,765.00 per month

Houring Rate in Excess of 240 hrs. per mo. @ 1/480 of \$1,765
or \$3.677 per hr.

OPA Approved Operating & Maintenance Service Rate
(2/5/43) \$4.90 per hour.

Special Contract—Excessive Wear & Tear @ \$2.00 per hour.

Motor Patrol Order #603

OPA—Reg. 134

Grader, Self Propelled, Diesel, Pneumatic

Tired, Extra Heavy Duty\$525.00 per month

Scarifier, Heavy 35.00 per month

Generator, Lights 15.00 per month

Total—OPA Bare Equipment Rental....\$575.00 per month

Hourly Rate in Excess of 240 hours per mo. @ 1/480 of \$575
or \$1.1979 per hr.

OPA Approved Operating & Maintenance Service Rate
(2/5/43) \$3.50 per hour.

Possession—Feb. 2, 1943 to April 15, 1943.

Light Plant

2000 Watt, Gasoline, Kohler #4160\$60.00 per month

Possession—Dec. 7, 1942 to Feb. 28, 1943.

Rooter

Woolridge Extra Heavy Rooter

Serial #3107, Weight - 15,000 lbs.....\$175.00 per month

Possession—Dec. 26, 1942 to April 13, 1943.

Defendant's Pre-Trial and Trial Exhibit
No. 21—(Continued)

[Kuckenberg Construction Statement Heading]

Date March 9, 1944

Sold To A. J. Goerig Construction Company,
Lloyd Building, Seattle, Washington

OPA BILLING FOR DECEMBER 1942

Ship To	Your Number
Terms: Net Cash	Our Order

Rental of Tractors & Equipment Bremerton, Washington—For
December 1942—Re-invoiced in accordance with OPA Maxi-
mum Price Regulation No. 134, 10/22/42

Tractor #414 (or 61-C) w/Bulldozer

OPA Bare Rental Rate (fractional month) 12/8 to 12/31—24 days—24/30 of \$1,095.....	\$ 876.00
190½ Hrs. OPA Approved Operating & Maintenance Rate @ \$4.40	838.20
190½ Hrs. Contract for Repairs & Breakage in Ex- cess of Ordinary Wear & Tear @ \$2.00.....	381.00
61 Hrs. Actual Overtime for Operators @ \$1.02.....	62.22

Tractor #408 w/Angle dozer

OPA Bare Rental Rate (fractional month) 12/8 to 12/31—24 days—24/30 of \$1,125	900.00
54½ Hrs. OPA Approved O & M rate @ \$4.40.....	239.80
54½ Hrs. Contract—Excess Repairs @ \$2.00.....	109.00
2 Hrs. Actual Overtime for Operators @ \$1.02.....	2.04

Tractor #411 w/Bulldozer

OPA Bare Rental Rate (fractional month) 12/8 to 12/31—24 days—24/30 of \$1,095	876.00
229½ Hrs. OPA Approved O & M rate @ \$4.40.....	1,009.80
229½ Hrs. Contract—Excess Repairs @ \$2.00.....	459.00
68 Hrs. Actual Overtime for Operators @ \$1.02.....	69.36

Tractor #420 w/Pusher & Carryall Scraper

OPA Bare Rental Rate (fractional month) 12/3 to 12/31—29 days—29/30 of \$1,765	1,691.66
232 Hrs. OPA Approved O & M rate @ \$4.90.....	1,136.80
232 Hrs. Contract—Excess Repairs @ \$2.00.....	464.00
54½ Hrs. Actual Overtime for Operators @ \$1.02....	55.59

Defendant's Pre-Trial and Trial Exhibit
No. 21—(Continued)

Rental of Tractors & Equipment, December 1942, Re-invoiced
in accordance with OPA—(Continued)

Tractor #417 w/Pusher & Carryall Scraper

OPA Bare Rental Rate (fractional month) 12/3 to 12/31—29 days—29/30 of \$1,765	\$1,691.66
225 Hrs. OPA Approved O & M rate @ \$4.90.....	1,102.50
225 Hrs. Contract—Excess Repairs @ \$2.00.....	450.00
60½ Hrs. Actual Overtime for Operators @ \$1.02....	61.71

Tractor #418 w/Angledozer & Carryall Scraper

OPA Bare Rental Rate (fractional month) 12/3 to 12/31—29 days—29/30 of \$1,915	\$1,851.16
193 Hrs. O & M rate for Cat & Angledozer @ \$4.40	849.20
45½ Hrs. O & M rate for Cat & Scraper @ \$4.90....	222.95
238½ Hrs. Contract—Excess Repairs @ \$2.00.....	477.00
62 Hrs. Actual Overtime for Operators @ \$1.02.....	63.24

Tractor #416 w/Pusher & Carryall Scraper

OPA Bare Rental Rate (fractional month) 12/4 to 12/31—28 days—28/30 of \$1,765	1,633.32
174½ Hrs. OPA Approved O & M rate @ \$4.90.....	855.05
174½ Hrs. Contract—Excess Repairs @ \$2.00.....	349.00
55 Hrs. Actual Overtime for Operators @ \$1.02.....	56.10

Rooter, Woolridge—Extra Heavy Duty

OPA Bare Rental Rate (fractional month) Dec. 26, 1942 to Jan. 25, 1943	175.00
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Cartage:

Western Heavy Hauling Co.	1,106.09
Jones Hauling Company	292.58
St. Johns Heavy Hauling Co.	324.36
Kuckenberg Construction Co.	218.77

December 1942—Total OPA Maximum.....\$20,960.16

Defendant's Pre-Trial and Trial Exhibit
No. 21—(Continued)

[Kuckenberg Construction Statement Heading]

Date March 9, 1944

Sold To A. J. Goerig Construction Company
Lloyd Building, Seattle, Washington

OPA BILLING FOR JANUARY 1943

Rental of Tractors & Equipment, Bremerton, Washington—For
January 1943—Re-invoiced in accordance with OPA Maxi-
mum Price Regulation No. 134, 10/22/42

Tractor #414 (or 61-C) w/Bulldozer

OPA Bare Rental Rate—January	\$1,095.00
166 Hrs. OPA Approved Operating & Maintenance Service Rate @ \$4.40	730.40
166 Hrs. Contract for Repairs & Breakage in Excess of Ordinary Wear & Tear @ \$2.00.....	332.00
55½ Hrs. Actual Overtime for Operators @ \$1.02....	56.61

Tractor #408 w/Bulldozer

OPA Bare Rental Rate—January	1,125.00
186½ Hrs. OPA Approved O & M rate @ \$4.40.....	820.60
186½ Hrs. Contract—Excess Repairs @ \$2.00.....	373.00
6 Hrs. Actual Overtime for Operators @ \$1.02.....	69.36

Tractor #411 w/Bulldozer

OPA Rate Rental Rate—January	1,095.00
42¾ Hrs. OPA Approved O & M Rate @ \$4.40.....	188.10
42¾ Hrs. Contract—Excess Repairs @ \$2.00.....	85.50
3 Hrs. Actual Overtime for Operators @ \$1.02.....	3.06

Tractor #420 w/Pusher & Carryall Scraper

OPA Bare Rental Rate—January	1,765.00
3½ Hrs. Equipment Rental in Excess of 240 Hrs. @ 1/480 of \$1,765—\$3.677 x 3½ hrs.....	12.87
149½ Hrs. O & M rate for Cat & Carryall @ \$4.90....	732.55
94 Hrs. O & M rate for Cat & Dozer @ \$4.40.....	413.60
243½ Hrs. Contract—Excess Repairs @ \$2.00.....	487.00
85½ Hrs. Actual Overtime for Operators @ \$1.02....	87.21

Defendant's Pre-Trial and Trial Exhibit
No. 21—(Continued)

Rental of Tractors & Equipment, January 1943, Re-invoiced
in accordance with OPA—(Continued)

Tractor #417 w/Pusher & Carryall Scraper

OPA Bare Rental Rate—January	\$1,765.00
34½ Hrs. Equipment Rental in Excess of 240 hrs. @	
1/480 of \$1,765—\$3.677 x 34½ hrs.....	126.86
264 Hrs. O & M rate for Cat & Carryall @ \$4.90.....	1,293.60
10½ Hrs. O & M rate for Cat & Dozer @ \$4.40.....	46.20
274½ Hrs. Contract—Excess Repairs @ \$2.00.....	549.00
82 Hrs. Actual Overtime for Operators @ \$1.02.....	83.64

Tractor #418 w/Angledozer & Carryall Scraper

OPA Bare Rental Rate—January	1,915.00
42 Hrs. Equipment Rental in Excess of 240 Hrs. @	
Cat & Dozer Rate only—1/480 of \$1,125—	
\$2.3437 x 42	98.44
242 Hrs. O & M Rate for Cat & Dozer @ \$4.40.....	1,064.80
40 Hrs. O & M Rate for Cat & Carryall @ \$4.90....	196.00
282 Hrs. Contract—Excess Repairs @ \$2.00.....	564.00
108½ Hrs. Actual Overtime for Operators @ \$1.02....	110.67

Tractor #416 (or 66-C) w/Pusher & Carryall Scraper

OPA Bare Rental Rate—January	1,765.00
12 Hrs. Equipment Rental in Excess of 240 Hrs. @	
Cat & Dozer rate only—1/480 of \$975 or	
\$2.03 x 12 hrs.	24.36
237 Hrs. O & M rate for Cat & Carryall @ \$4.90.....	1,161.30
15 Hrs. O & M rate for Cat & Dozer @ \$4.40.....	66.00
252 Hrs. Contract—Excess Repairs @ \$2.00.....	504.00
77 Hrs. Actual Overtime for Operators @ \$1.02.....	78.54

Rooter, Woolridge—Extra Heavy

OPA Bare Rental Rate—Jan. 26 to Feb. 25.....	175.00
----------------------------------------------	--------

Light Plant—Kohler #4160—Gasoline

OPA Bare Rental Dec. 7, 1942 to Feb. 6, 1943 @ \$60	120.00
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Cartage on Caterpillar #12 Road Patrol	139.77
----------------------------------------------	--------

Additional Time Billed Feb. 10, 1943 for Showup Time	89.89
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January 1943—Total OPA Maximum.....\$21,408.93

Defendant's Pre-Trial and Trial Exhibit
No. 21—(Continued)

[Kuckenberg Construction Co. Statement Heading]

March 9, 1944

Sold To A. J. Goerig Construction Company
 Lloyd Building, Seattle, Washington

OPA BILLING FOR FEBRUARY 1943

Rental of Tractors & Equipment, Bremerton, Washington—For
February 1943—Re-invoiced in accordance with OPA Maxi-
mum Price Regulation No. 134, 10/22/42

Tractor #411 w/Bulldozer

OPA Bare Rental Rate—February	\$1,095.00
106 Hrs. OPA Approved Operating & Maintenance Service Rate @ \$4.40	466.40
106 Hrs. Contract for Repairs & Breakage in Excess of Ordinary Wear & Tear @ \$2.00.....	212.00
27 Hrs. Actual Overtime for Operators @ \$1.02.....	27.54

Tractor # 408 w/Angledozer

OPA Bare Rental Rate—February	1,125.00
123 Hrs. OPA Approved O & M rate @ \$4.40.....	541.20
123 Hrs. Contract—Excess Repairs @ \$2.00.....	246.00
25½ Hrs. Actual Overtime for Operators @ \$1.02....	26.01

Tractor #417 w/Pusher & Carryall Scraper

OPA Bare Rental Rate—February	1,765.00
89½ Hrs. O & M rate for Cat. & Carryall @ \$4.90....	438.55
10½ Hrs. O & M rate for Cat. & Dozer @ \$4.40.....	46.20
100 Hrs. Contract—Excess Repairs @ \$2.00.....	200.00
23½ Hrs. Actual Overtime for Operators @ \$1.02....	23.97

Tractor #418 w/Angledozer & Carryall Scraper

OPA Bare Rental Rate—February	1,915.00
201½ Hrs. O & M rate for Cat & Carryall @ \$4.00....	987.35
7 Hrs. O & M rate for Cat & Dozer @ \$4.40.....	30.80
208½ Hrs. Contract—Excess Repairs @ \$2.00.....	417.00
69½ Hrs. Actual Overtime for Operators @ \$1.02....	70.89

Defendant's Pre-Trial and Trial Exhibit
No. 21—(Continued)

Rental of Tractors & Equipment, February 1943, Re-invoiced
in accordance with OPA—(Continued)

Tractor #420 w/Pusher & Carryall Scraper

OPA Bare Rental Rate—February	\$1,765.00
237½ Hrs. O & M rate for Cat & Carryall @ \$4.90....	1,163.75
2½ Hrs. O & M rate for Cat & Dozer @ \$4.40.....	11.00
240 Hrs. Contract—Excess Repairs @ \$2.00	480.00
74 Hrs. Actual Overtime for Operators @ \$1.02.....	75.48

Tractor #414 (or 61-C) w/Bulldozer

OPA Bare Rental Rate—February	1,095.00
8 Hrs. Equipment Rental in Excess of 240 Hrs. @ 1/480 of \$1,095—\$2.20 x 8 hrs.....	18.24
*248 Hrs. OPA Approved O & M rate @ \$4.40.....	1,091.20
*248 Hrs. Contract—Excess Repairs @ \$2.00.....	496.00
67½ Hrs. Actual Overtime for Operators @ \$1.02....	68.85

*(Was billed at 234 hrs. Have added 13 hrs. to Tractor #414 or 61-C incorrectly posted to Carryall 61-B. Time sheets are correct.)

Tractor #416 (or 66-C) w/Pusher & Carryall Scraper

OPA Bare Rental Rate—February	1,765.00
220½ Hrs. O & M rate for Cat & Carryall @ \$4.90....	1,080.45
3 Hrs. O & M rate for Cat & Dozer @ \$4.40.....	13.20
223½ Hrs. Contract—Excess Repairs @ \$2.00.....	447.00
68 Hrs. Actual Overtime for Operators @ \$1.02.....	69.36

Rooter, Woolridge—Extra Heavy Duty

OPA Bare Rental rate—Feb. 26 to March 25.....	175.00
Additional invoice (3/6/43) for labor and superintendent as per contract	450.00

Motor Patrol Grader #603

OPA Bare Rental Rate (fractional month) Feb. 2 to 28—27 days—27/30 of \$575	517.48
101½ Hrs. OPA Approved O & M rate @ \$3.50.....	355.25
23½ Hrs. Actual Overtime for Operators @ \$1.02....	23.97

February 1943—Total OPA Maximum.....\$20,795.14

Defendant's Pre-Trial and Trial Exhibit
No. 21—(Continued)

[Kuckenberg Construction Co. Statement Heading]

Date March 9, 1944

Sold To A. J. Goerig Construction Company
Lloyd Building, Seattle, Washington

OPA BILLING FOR MARCH 1943

Rental of Tractors & Equipment, Bremerton, Washington—For
March 1943—Re-invoiced in accordance with OPA Maxi-
mum Price Regulation No. 134, 10/22/42

Tractor #408 w/Angledozer

OPA Bare Rental Rate—March	\$1,125.00
85½ Hrs. Equipment Rental in Excess of 240 Hrs. @ 1/480 of \$1,125—\$2.3437 x 85½ hrs.....	200.39
325½ Hrs. OPA Approved Operating & Maintenance Service Rate @ \$4.40.....	1,432.20
325½ Hrs. Contract for Repairs & Breakage in Excess of Ordinary Wear & Tear at \$2.00.....	651.00
133½ Hrs. Actual Overtime for Operator @ \$1.02....	136.17

Tractor #414 (or 61-C) w/Bulldozer

OPA Bare Rental Rate (fractional month) March 1 to 5—5/30 of \$1,095	182.50
49 Hrs. OPA Approved O & M rate @ \$4.40.....	215.60
49 Hrs. Contract—Excess Repairs @ \$2.00.....	98.00
9 Hrs. Actual Overtime for Operator @ \$1.02.....	9.18

Tractor #417 w/Pusher & Carryall Scraper

OPA Bare Rental Rate—March	1,765.00
35½ Hrs. Equipment Rental in Excess of 240 hrs. @ 1/480 of \$1,765—\$3.677 x 35½ hrs.....	130.53
275½ Hrs. OPA Approved O & M rate @ \$4.90.....	1,349.95
275½ Hrs. Contract—Excess Repairs @ \$2.00.....	551.00
107½ Hrs. Actual Overtime for Operators @ \$1.02....	109.65

Tractor #418 w/Angledozer & Carryall Scraper

OPA Bare Rental Rate—March	1,915.00
149½ Hrs. Equipment Rental in Excess of 240 hrs. @ Cat & Dozer rate 1/480 of \$1,125—\$2.3437 x 149½ hrs.	350.38
194 Hrs. O & M rate for Cat & Carryall @ \$4.90.....	950.60
195½ Hrs. O & M rate for Cat & Dozer at \$4.40.....	860.20
389½ Hrs. Contract—Excess Repairs @ \$2.00.....	779.00
157 Hrs. Actual Overtime for Operator @ \$1.02.....	160.14

Defendant's Pre-Trial and Trial Exhibit
No. 21—(Continued)

Rental of Tractors & Equipment, March 1943, Re-invoiced
in accordance with OPA—(Continued)

Tractor #420 w/Pusher & Carryall Scraper	
OPA Bare Rental Rate—March	\$1,765.00
211½ Hrs. Equipment Rental in Excess of 240 hrs.	
@ 1/480 of \$1,765—\$3.677 x 211½ hrs.....	777.69
451½ Hrs. OPA Approved O & M rate @ \$4.90.....	2,212.35
451½ Hrs. Contract—Excess Repairs @ \$2.00.....	903.00
189 Hrs. Actual Overtime for Operator @ \$1.02.....	192.78
Tractor #416 (or 66-C) w/Pusher & Carryall Scraper	
OPA Bare Rental Rate—March	1,765.00
44½ Hrs. Equipment Rental in Excess of 240 hrs @	
Cat & Dozer rate 1/400 of \$1,765—\$3.677x44½ hrs.	163.63
233 Hrs. O & M rate for Cat & Carryall @ \$4.90.....	1,141.70
51½ Hrs. O & M rate for Cat & Dozer @ \$4.40.....	226.60
284½ Hrs. Contract—Excess Repairs @ \$2.00.....	569.00
108½ Hrs. Actual Overtime for Operators @ \$1.02....	110.67
Tractor #411 w/Bulldozer	
OPA Bare Rental Rate—March	1,095.00
54 Hrs. Equipment Rental in Excess of 240 hrs. @	
1/480 of \$1,095—\$2.28 x 54 hrs.....	123.12
294 Hrs. OPA Approved O & M rate @ \$4.40.....	1,293.60
294 Hrs. Contract—Excess Repairs @ \$2.00.....	588.00
111 Hrs. Actual Overtime for Operator @ \$1.02.....	113.22
Motor Patrol Grader #603	
OPA Bare Rental Rate—March	575.00
129½ Hrs. Equipment Rental in Excess of 240 hrs.	
@ 1/480 of \$575—\$1.1979 x 129½ hrs.....	155.13
369½ Hrs. OPA Approved O & M rate @ \$3.50.....	1,293.25
117½ Hrs. Actual Overtime for Operator @ \$1.02....	119.85
Miscellaneous Items	
10 Hrs. Starting Time for Operator @ \$1.70.....	17.00
1 Hr. Operators Time as per Invoice.....	1.70
9 Hrs. Welding Time @ \$6.00	54.00
7½ Hrs. Operator on Ripper—Regular Time @ \$1.70	12.75
7½ Hrs. Operator on Ribber—Overtime @ \$1.02.....	7.65
20 Hrs. Showup Time @ \$1.70	34.00
<hr/>	
March 1943—Total OPA Maximum.....	\$28,282.18

Defendant's Pre-Trial and Trial Exhibit
No. 21—(Continued)

[Kuekenberg Construction Co. Statement Heading]

Date March 9, 1944

Sold To A. J. Goerig Construction Company,
Lloyd Building, Seattle, Washington

OPA BILLING FOR APRIL 1943

Rental of Tractors & Equipment, Bremerton, Washington—
For April 1943—Re-invoiced in accordance with OPA
Maximum Price Regulation No. 134, 10/22/42.

Tractor #408 w/Angledozer

OPA Bare Rental Rate (fractional month) April 1
to 15

214½ Hrs. @ 1/240 of \$1,125—4.687 per hr x 214½
hrs. \$1,005.36

214½ Hrs. OPA Approved Operating & Maintenance
Service Rate @ \$4.40 943.80

214½ Hrs. Contract for Repairs & Breakage in Ex-
cess of Ordinary Wear & Tear @ \$2.00..... 429.00

91 Hrs. Actual Overtime for Operators @ \$1.02..... 92.82
(Includes Correction Invoice of July 28, 1943)

Tractor #418 w/Angledozer

OPA Bare Rental (fractional month) April 1 to 15

140 Hrs. @ 1/240 of \$1,125—4.687 per hr x 140 hrs. 656.18

140 Hrs. OPA Approved O & M rate @ \$4.40..... 616.00

140 Hrs. Contract—Excess Repairs @ \$2.00..... 280.00

44½ Hrs. Actual Overtime for Operators @ \$1.02.... 45.39

Tractor #416 (or 66-C) w/Pusher & Carryall Scraper

OPA Bare Rental (fractional month) April 1 to 15

144½ Hrs. @ 1/240 of \$1,765—7.354 x 144½..... 1,062.65

126 Hrs. O & M Rate for Cat & Carryall @ \$4.90.... 617.40

18½ Hrs. O & M Rate for Cat & Dozer @ \$4.40..... 81.40

144½ Hrs. Contract—Excess Repairs @ \$2.00..... 289.00

55 Hrs. Actual Overtime for Operator @ \$1.02..... 56.10

Tractor #420 w/Pusher & Carryall Scraper

OPA Bare Rental (fractional month) April 1 to 15

145½ Hrs. @ 1/240 of \$1,765—7.354 x 145½..... 1,070.01

145½ Hrs. OPA Approved O & M rate @ \$4.90..... 712.95

145½ Hrs. Contract—Excess Repairs @ \$2.00..... 291.00

51 Hrs. Actual Overtime for Operator @ \$1.02..... 52.02

Defendant's Pre-Trial and Trial Exhibit
No. 21—(Continued)

Rental of Tractors & Equipment, April 1943, Re-invoiced
in accordance with OPA—(Continued)

Tractor #417 w/Pusher & Carryall Scraper

OPA Bare Rental (fractional month) April 1 to 15

150½ Hrs. @ 1/240 of \$1,765—7.354x150½.....	\$1,106.78
150½ Hrs. OPA Approved O & M rate @ \$4.90.....	737.45
150½ Hrs. Contract—Excess Repairs @ \$2.00.....	301.00
56 Hrs. Actual Overtime for Operator @ \$1.02.....	57.12

Motor Patrol Grader #603

OPA Bare Rental (fractional month) April 1 to 15

165½ Hrs. @ 1/240 of \$575.00—2.396 x 166½.....	396.54
165½ Hrs. OPA Approved O & M rate @ \$3.50.....	579.25
68½ Hrs. Actual Overtime for Operator @ \$1.02....	69.87

Rooter—Woolridge—Extra Heavy Duty

March 26 to April 13—19/30 of \$175.....	110.96
Showup Time for Operators—6 hrs. @ \$1.70.....	10.20

April 1943—Total OPA Maximum.....\$11,670.25

DEFENDANT'S PRE-TRIAL AND TRIAL EXHIBIT No. 23

HOURLY RATE ANALYSIS—BARE RENTAL
Kuckenberg-Goerig Rental 1942-1943

FROM OPA MAXIMUM BILLING

Bare Rental—Houring Rate Variation

	OPA Bare Rental	Hrs. Worked	Would Be An Hourly Rate Of
#408 Tractor w/Angledozer			
December	\$ 900.00	541½	\$16.51
January	1,125.00	186½	6.03
February	1,125.00	123	9.15
March	1,325.39	325½	4.07
April	1,005.36	214½	4.69
#411 Tractor w/Bulldozer			
December	876.00	229½	3.82
January	1,095.00	42¾	25.61
February	1,095.00	106	9.33
March	1,218.12	294	4.14
April	.....	....	.....
#414 Tractor w/Bulldozer			
December	876.00	190½	4.60
January	1,095.00	166	6.60
February	1,113.24	248	4.49
March	182.50	49	3.72
April	.....	....	.....
#416 Tractor w/Carryall			
December	1,633.32	174½	9.36
January	1,789.36	252	7.10
February	1,765.00	223½	7.89
March	1,928.63	284½	6.78
April	1,062.65	144½	7.35
#417 Tractor w/Carryall			
December	1,691.66	225	7.52
January	1,891.86	274½	6.89
February	1,765.00	100	17.65
March	1,895.53	275½	6.88
April	1,106.78	150½	7.35

Hourly Rate Analysis—Bare Rental—(Continued)

	OPA Bare Rental	Hrs. Worked	Would Be An Hourly Rate Of
#418 Tractor w/Carryall			
December	1,851.16	238½	7.76
January	2,013.44	282	7.14
February	1,915.00	208½	9.18
March	2,265.38	389½	5.82
April	656.18	140	4.69
#420 Tractor w/Carryall			
December	1,691.66	232	7.29
January	1,777.87	243½	7.30
February	1,765.00	240	7.35
March	2,542.69	451½	5.63
April	1,070.01	145½	7.35
#603 Motor Patrol Grader			
December	-----	---	-----
January	-----	---	-----
February	517.48	101½	5.10
March	730.13	369½	1.98
April	396.54	165½	2.39

DEFENDANTS' PRE-TRIAL AND TRIAL EXHIBIT NO. 24

Kuckenberg Construction Co.

General Contractors

11104 Northeast Holman Street

Bus. Phone: WE 2259

Portland, Oregon

November 30, 1942.

A. J. Goerig Construction Company,
Lloyd Building,
Seattle, Washington.

Gentlemen:

We herewith propose to furnish you on a rental

basis Tractors, Carryalls and Tournapulls to be used on Contract which you have with the U. S. Engineers for construction an Airport located in Kitsap County, near Bremerton, Washington, for a minimum period of sixty days from this date, at which time if the equipment is required by us on our work we have the right to recall same.

The equipment is to work at least two eight hour shifts, however we are to be allowed a half hour during each eight hour shift for adjustments, maintenance or minor repairs on each piece of equipment, this time not deductible from hourly rental. You are to take delivery of equipment in Portland and return same to us at our Warehouse at Portland, Oregon at your expense.

Price per hour, as follows:

Tractor & Carryall fully maintained & Operated, 11.60 per hour.

Super C Tournapulls fully maintained & Operated, 11.60 per hour.

Pusher Tractor fully maintained & Operated, 9.00 per hour.

Payment: We are to be paid in full the tenth of the following month for each previous months rental. Time to be based on signed operators reports. A certified check in the amount of \$30,000.00 will be deposited and held in escrow for our account, until we receive our final payment, in the First National Bank, Portland, Oregon.

These rates are based on eight hour day or forty hours per week, operation, overtime Saturday and

Sunday work you are to pay the additional overtime wages for personel on the project.

Kindly sign one copy of acceptance and return for our files.

Very truly yours,

KUCKENBERG CONSTRUCTION COMPANY

HENRY KUCKENBERG

Henry Kuckenberg

Partner

A. J. GOERIG CONSTRUCTION CO.

By A. J. GOERIG

Accepted A. J. Goerig

Const. Co.

G. W. WALCH

Accepted:

G. W. WALCH

Portland, Oregon

December 4, 1942

It Is Agreed between Kuckenberg Construction Co. and A. J. Goerig Construction Co. that the contract on the reverse side of this document is hereby amended and altered to this extent: That signed operators' reports are to be approved each day by A. J. Goerig Construction Co. or the representatives of said A. J. Goerig Construction Co.

It Is Further Agreed that at such time as Kuckenberg Construction Co. has received payment in full of all money due under the terms of said contract and said equipment has been returned to the

warehouse of said Kuckenberg Construction Co. at Portland, Oregon as provided in said contract and all terms and conditions to be performed by said A. J. Goerig under the provisions of said contract have been performed then said Kuckenberg Construction Co. agrees to instruct the First National Bank of Portland, Oregon, Main Branch, to return to A. J. Goerig Construction Co. the certified check for \$30,000.00 deposited with said First National Bank of Portland to secure faithful performance by said A. J. Goerig Construction Co. of its part of the terms of said contract.

KUCKENBERG CONSTRUCTION CO.

By HENRY KUCKENBERG

Partner

A. J. GOERIG CONSTRUCTION CO.

By CLYDE PHELP

Partner

DEFENDANTS' PRE-TRIAL AND TRIAL
EXHIBIT NO. 25

Kuckenberg Construction Co.
General Contractors
11104 Northeast Holman Street

Bus. Phone: TRinity 0407

Portland, Oregon
January 9, 1943.

A. J. Goerig Construction Company,
Lloyd Building,
Seattle, Washington.

Gentlemen:

It is agreed between the Kuckenberg Construction Company and A. J. Goerig Construction Company that this agreement is to be made a part of the original contract date November 30th, 1942 covering rental of equipment on a contract located in Kitsap County near Bremerton, Washington.

That due to soil conditions and operating conditions it has been found that the material encountered is such that ordinary wear and tear of the equipment is far greater then normally would be encountered in this type of work, and that repairs are running greatly in excess, inasmuch as these existing conditions were not properly represented to us by Employees handling your contract at the time of entering into this contract, we feel that we are entitled to compensation for repairs and break-ages in excess of normal wear and tear.

We have found that the Tractos will require new rail, bottom rollers, sprockets and front idlers from about five hundred hours operation, normally they

run between three thousand and five thousand hours. So you can readily see that the wear is far greater than normally expected.

As per conversation this date between A. J. Goerig, Clyde Phelps and Messrs. Henry A and L. W. Kuckenberg the following was agreed upon. That due to above extra expense, A. J. Goerig Const. Co., are to pay us an extra \$2.00 per hour for Tractor rental covered by signed operators reports. These rates to apply during the entirety of the contract dated November 30, 1942.

Also we are to furnish a Foreman who has full charge of the operating and repair of our equipment, at a salary not to exceed \$90.00 per week. You are to reimburse us for one half the expense of this employee.

Very truly yours,

KUCKENBERG CONSTRUCTION COMPANY

HENRY KUCKENBERG

Henry Kuckenberg

Partner

A. J. GOERIG

CONSTRUCTION COMPANY.

By A. J. GOERIG

Accepted

A. J. GOERIG CONST. COM.

DEFENDANT'S PRE-TRIAL AND TRIAL EXHIBIT No. 26

KUCKENBERG CONSTRUCTION CO.

General Contractors

11104 Northeast Holman Street

Bus. Phone WE 2259

Portland, Oregon

Bremerton Airport—Kitsap County

A. J. Goerig Contract

RECAP—REPAIRS BREMERTON TRACTORS (Due to unusual breakage, wear and tear, working under extremely hazardous conditions).

Tractor No.	Parts	Bremerton Labor	Portland Labor
414	\$ 2370.46	\$ 250.12	\$ 428.75
416	2179.15	169.90	339.15
417	2638.33	264.56	189.45
420	2408.00	141.66	201.50
408	3404.48	284.12	433.35
411	2810.73	191.58	387.60
418	2308.30	191.66	247.34
Sub Total	\$18119.45	\$1493.60	\$2227.14
Carryall No.			
63B	\$ 986.42	\$ 105.75	\$ 630.00
61B	2877.86	143.68	720.00
57B	1665.79	281.54	860.00
62B	1787.34	95.57	736.00
Sub Total	\$7317.41	\$ 626.54	\$2946.00
Plus:			
Insurance (Soc. Sec. Ind. Ins., etc.)		233.22	589.27
Total	\$25436.86	\$2353.36	\$5762.41
Combined Total.....\$33,552.63			

Defendant's Pre-Trial and Trial Exhibit
No. 26—(Continued)

[Kuckenberg Construction Co. Statement Heading]

Bremerton Airport—Kitsap County

A. J. Goerig Contract

Unusual breakage, wear and tear, Tractor #61 (#414)

Date	Description	Bremerton Labor	Parts	Portland Labor
1/8-14/43	Final Drive out (down until 1/14	109.00	215.03	
1/10/43	Replace Tracks—12 Roll- ers — 1 Sprocket — 1 Idler	38.00	540.00	200.35
	Shop Crew went to Bremerton		181.20 163.80 85.70 67.40	
1/18/43	Replace Drawbar	6.12	51.35	
3/3/43	Replace Final Drive Housing	97.00	215.03	
3/15/43	Rails—6 Rollers—1 Sprocket..... (Portland Shop)		540.00 120.80 54.60 85.70	221.50
3/15/43	Replace Drawbar (Miss- ing on arrival at Port- land)		49.85	6.85
		<u>\$250.12</u>	<u>\$2370.46</u>	<u>\$428.75</u>

Defendant's Pre-Trial and Trial Exhibit
No. 26—(Continued)

Unusual breakage, wear and tear, Tractor #416 (66C)

Date	Description	Bremerton Labor	Parts	Portland Labor
1/27-29/43	New Rails—6 Rollers—2 Sprockets	62.00	540.00 81.90 90.60 171.40	97.72
3/4/43	New Drawbar	13.70	49.85	
3/10-12/43	Replace Tracks & 12 Rollers & 2 Idlers.....	94.20	540.00 163.80 181.20 134.80	78.43
4/26/43	2 Sprockets—4 Top Rollers		171.40	
	(Portland Shop)		54.20	163.00
		<u>\$169.90</u>	<u>\$2179.15</u>	<u>\$339.15</u>

Unusual breakage, wear and tear, Tractor #417

Date	Description	Bremerton Labor	Parts	Portland Labor
1/3/43	Tracks—6 Rollers	84.00	864.00 81.90 90.60	
2/15/43	Broken Drawbar	10.20	51.35	
2/20/43	Bellows Seal Out	43.26	9.80	
2/25/43	Final Drive Out (shop crew at Bremerton)....	14.30	215.03	83.16
3/10-12/43	New Rails & 14 Rollers & 2 Sprockets & 2 Idlers	101.50	540.00 181.20 163.80 27.10 171.40 134.80	97.09
3/11/43	Broken Drawbar	11.30	49.85	
4/24/43	2 Rollers—(Portland Shop)		30.20 27.30	9.20
		<u>\$264.56</u>	<u>\$2638.33</u>	<u>\$189.45</u>

Defendant's Pre-Trial and Trial Exhibit
No. 26—(Continued)

Unusual breakage, wear and tear, Tractor #420

Date	Description	Bremerton Labor	Parts	Portland Labor
1/17/43	Broken Drawbar	5.10	51.35	
1/24/43	Renew Rails & 10 Roll- ers—1 Idler	87.00	540.00 120.80 109.20 27.10 67.40	80.00
3/7/43	Broken Drawbar	6.12	51.35	
3/18/43	Replace 2 Rollers.....	17.14	60.40	
3/30/43	4 Rollers	26.30	60.40 54.60	
4/22/43	New Tracks—8 Rollers —25 Sprockets (Port- land Shop)		864.00 109.20 171.40	121.50
		<u>\$141.66</u>	<u>\$2408.00</u>	<u>\$201.50</u>

Defendant's Pre-Trial and Trial Exhibit
No. 26—(Continued)

Unusual breakage, wear and tear, Tractor #408

Date	Description	Bremerton Labor	Parts	Portland Labor
			109.20	
1/2/43	Replace Rails & 6	102.00	864.00	
	Rollers	64.26	60.40	
2/15/43	Replace 1 Roller.....	4.08	30.20	
3/26/43	Broken Drawbar	9.00	49.85	
2/21/43	Final Drive Out		215.03	
	New Tracks & 14 Roll- ers — 2 Sprockets — 2		540.00	
	Idlers (Shop crew at Bremerton)	91.52	181.20	212.95
			163.80	
			27.10	
			171.40	
			134.80	
4/6/43	Replace Broken Roll- ers (2)	13.26	60.40	
4/20/43	Rails—10 Rollers (Portland Shop)		540.00	220.40
			120.80	
			109.20	
			27.10	
		<u>\$284.12</u>	<u>\$3404.48</u>	<u>\$433.35</u>

Defendant's Pre-Trial and Trial Exhibit

No. 26—(Continued)

Unusual breakage, wear and tear, Tractor #411 (#55)

Date	Description	Bremerton Labor	Parts	Portland Labor
12/24/42	New Drawbar	11.00	49.85	
1/2/43	Replace Drawbar (time & 1/2).....	20.00	51.35	
1/12/43	Reweld Dozer Blade.....	4.08		
2/2-3/43	Repair Final Drive— 6 Rollers	87.50	215.30	97.50
2/24/43	Replace Rails & 10 Rollers		108.80	
2/24/43	Replace Rails & 10 Rollers	69.00	540.00	112.50
			151.00	
			109.20	
			27.10	
4/18/43	Tracks—2 Sprockets— 16 Rollers		864.00	177.60
			181.20	
			163.80	
			54.20	
			171.40	
		\$191.66	\$2308.30	\$247.34

Unusual breakage, wear and tear, Tractor & Drozer, Tractor #418

Date	Description	Bremerton Labor	Parts	Portland Labor
1/24-25/43	New Tracks & 8 Rollers —2 Sprockets		540.00	
			120.80	
		90.00	109.20	72.34
			171.40	
2/23/43	Broken Drawbar	18.36	49.85	
3/17/43	Broken Drawbar	7.00	51.35	
4/22/43	Rails — 12 Rollers — 1 Sprocket—2 Idlers (Portland Shop)	96.30	864.00	175.00
			181.20	
			85.70	
			134.80	
		\$101.66	\$2308.30	\$247.34

Defendant's Pre-Trial and Trial Exhibit
No. 26—(Continued)

Unusual breakage, wear and tear, (63B) "W" Scraper
form Spokane

Date	Description	Labor	Parts
1/2/43	Replace Bit	\$ 18.72	\$ 59.80
1/14/43	Broke Lead Block	14.00	
1/10/43	Repair	10.20	
2/2-3/43	Repair Tongue & Apron—		
	50#s iron at 0.08c.....	25.50	4.00
2/24/43	Broken Line .....	.85	
2/26/43	Change Unit Cone	5.00	7.54
3/6/43	Change Unit Cones	11.48	15.08
3/14/43	Broken Line	1.70	
3/15/43	Broken Line	5.10	
3/23/43	Broken Line & Tongue		
	—100#s iron at 0.08c.....	6.40	8.00
4/9/43	Broken Sheaves	6.80	
		<u>\$105.75</u>	
	6000 ft.—1/2" Line Consumed during job.....		649.80
	250 ft.—3/4" Line Consumed during job.....		53.25
	Repair required to bring scraper up to same condition as when shipped to Bremerton:		
	50 hrs. welding at 3.00	150.00	
	500#s plate and Parts		129.15
	240 hrs. shop time at 2.00	480.00	
	Bit and Bolts		59.80
		<u>\$735.75</u>	<u>\$986.42</u>

Unusual breakage, wear and tear, Scraper #61B

Date	Description	Labor	Parts
12/30/42	Broken Line	\$ 3.00	
1/4/43	Repair Unit	2.55	
1/8/43	Repair Unit	5.00	
1/9/43	Flat Tire	9.00	525.00
1/12/43	Rock in Tire .....	.85	

Defendant's Pre-Trial and Trial Exhibit
No. 26—(Continued)

Unusual breakage, wear and tear, Seraper #61B—(Contd.)

Date	Description	Labor	Parts
1/13/43	Tail Gate Line	3.40	
	Flat Tire	12.00	160.00
1/15/43	Change Tire	12.55	525.00
	Repair (Weld Scraper)	3.40	
1/16/43	Broken Line	1.70	
	Broken Line .....	.85	
1/17/43	Broken Line	1.70	
1/25/43	Broken Line	5.10	
1/26/43	Repairs	13.60	
1/27/43	Repair (Gooseneck 50#s iron at .08c.....)	5.10	4.00
2/9/43	Welding Seraper	2.50	
2/20/43	Repair	5.10	
2/22/43	Broken Bit	11.00	60.04
2/27/43	Change Seraper	2.55	
3/4/43	Change Bit	7.00	60.04
	Flat Tire	12.00	525.00
3/6/43	Unit Repair	5.10	
3/9/43	Change Seraper	2.55	
3/20/43	Change Seraper	6.28	
4/4/43	Change Seraper	3.40	
4/7/43	Broken Line .....	.85	
4/8/43	Welding Bit	4.70	
4/9/43	Replace Wedge .....	.85	
		143.68	
	7000 ft.—1/2" cable consumed during job.....		758.10
	300 ft.—3/4" cable consumed during job.....		63.90
	Repair required to bring scraper up to same condition when shipped to Bremerton:		
	70 hrs. welding at 3.00.....	210.00	
	Parts		196.78
	255 hrs. shop time at 2.00.....	510.00	
		<hr/> \$863.68	<hr/> \$2877.86

Defendant's Pre-Trial and Trial Exhibit
No. 26—(Continued)

Unusual breakage, wear and tear, Scraper #57B

Date	Description	Labor	Parts
12/26/42	Arch Assembly (Built in Portland Shop)	\$117.00	\$ 41.32
1/4/43	Broken Line	2.55	
1/8/43	Broken Line	2.55	
1/10-11/43	Broken Tongue (70#s iron at .08c	9.00	5.60
1/14/43	Broken Cable .....	.85	
1/14/43	Broken Cable	2.55	
1/15/43	Repair	1.70	
1/16/43	Broken Line	5.00	
	Broken Tongue (150#s iron at .08c	30.00	12.00
1/18/43	Repair	2.55	
2/9/43	Welding	15.46	
2/16/43	Broken Line	2.55	
2/17/43	Adjust Unit	1.70	
2/19/43	Repair Unit	5.95	
	Replace Tongue Block	7.40	21.00
2/22/43	Cable	1.70	
2/24/43	Cable	3.40	
2/26/43	Cable	3.40	
2/26/43	Cable	2.55	
3/3/43	Cable .....	.85	
3/5/43	Cable	1.70	
3/7/43	Tire Repair	6.70	525.00
3/10/43	Cable .....	.85	
3/11/43	Unit Repair	1.70	
3/12/43	Welding Scraper (40# iron at 08c)	6.23	3.20
3/14/43	Welding Scraper & broken line...	4.25	
3/15/43	Broken Bit	3.40	61.84
3/16/43	Weld Side Cutters	16.00	
3/18/43	Broken Line	3.40	
3/20/43	Welding Bit	6.70	
3/23/43	Broken Line	2.55	
4/5/43	Repair Line—New Cones .....	.85	15.08

Defendant's Pre-Trial and Trial Exhibit
No. 26—(Continued)

Unusual breakage, wear and tear, Scraper #57-B—(Contd.)

Date	Description	Labor	Parts
4/7/43	Cable	3.40	
	Broken Bit	5.10	61.84
		<hr/>	
		\$281.54	
7000 ft. Cable Consumed during job at \$10.83			758.10
Repair required to bring scraper up to same condition as when shipped to Bremerton:			
120 hrs. welding at 3.00.....		360.00	
700#s plate & Parts			140.81
250 hrs. shop time at 2.00.....		500.00	
		<hr/>	<hr/>
		\$1141.54	\$1665.79

Unusual breakage, wear and tear, Scraper 62B

Date	Description	Labor	Parts
12/30/42	Repair	\$ 3.00	
1/6/43	Repair Unit .....	.85	
1/11/43	Broken Line	1.70	
1/12/43	Broken Line	2.55	
	Broken Sheave Guides	1.70	
1/13/43	Broken Cable	10.00	
1/15/43	Broken Cable	3.40	
1/16/43	Broken Cable	1.70	
1/18/43	Repair—Cracked Tongue (iron)..	11.50	4.00
1/19/43	Broken Cable	1.70	
1/27/43	Broken Cable	3.83	
2/9/43	Weld Scraper	5.00	
2/18/43	Broken Cable .....	.85	
1/26/43	Repair Scraper	11.90	
2/24/43	Broken Bit	2.55	59.60
	Broken Cable	1.70	
2/27/43	Power Unit Repair (refined cone)	3.82	7.54
2/28/43	Broken Line	1.27	
	Unit Repair	2.55	
3/2/43	Broken Line .....	.85	
3/3/43	Broken Line .....	.85	

Defendant's Pre-Trial and Trial Exhibit
No. 26—(Continued)

Unusual breakage, wear and tear, Scraper 63B—(Contd.)

Date	Description	Labor	Parts
3/4/43	Change Bit	7.00	59.60
3/12/43	Flat Tire	10.85	475.00
4/5/43	Change Scraper	3.40	
4/7/43	Broken Apron Line	3.40	
4/10/43	Change Bit	7.00	59.60
4/8/43	Change Scraper	2.55	
		\$ 95.57	
7000 ft.—1½" Cable consumed during job.....			758.10
300 ft.—¾" Cable consumed during job.....			63.90
Repair required to bring scraper up to same condition as when shipped to Bremerton:			
100 hrs. Welding at 3.00		300.00	
Parts			300.00
218 hrs. Shop time at 2.00		436.00	
		\$831.57	\$1787.34

Mr. Gentner: You have no further evidence?

The Court: Not at present.

Mr. Wagner: Not at this time.

Mr. Gentner: At this time, your Honor, the defendants move to dismiss this action on the ground that, on the facts and on the law, the plaintiff has shown no ground entitling him to relief.

The defendants have two points to raise under this motion; first is a jurisdictional one, and that it is the point that the Court lacks jurisdiction in this case, for the reason that the bringing of the action was not authorized——

The Court: I can hear you later on that. Jurisdiction is never waived.

Mr. Gentner: Yes. All right.

The Court: I can hear it again at the end of the case. [110]

Mr. Wagner: In that connection, your Honor, I did err in concluding my case before completing the record. It was left incomplete at pre-trial, and I would at this time like to supplement the record with the same matters that were involved in the Wheeler case, namely, the delegation of authority by the Administrator under date of June 10th, 1943, the amendment of that date in 8 Federal Register 8027, and, namely, by General Order No. 3; and also the teletype from the regional office to the Portland District Office under date of June 4th, 1943.

The Court: Mark those, Mr. Person. They will get new numbers. They may be admitted. Are you familiar with them?

Mr. Gentner: Yes, your Honor. They are included in the pre-trial order.

The Court: Oh, were they? Numbers were allowed for them there?

Mr. Gentner: 7-(a), (b), (c), (d) and (e) are inclusive of the April 23rd memorandum, which I don't believe has any particular bearing.

The Court: Well, you may straighten that out with Mr. Wagner and Mr. Gentner later as to the numbers of them, Mr. Reporter. They are admitted as trial exhibits.

Mr. Wagner: Thank you.

(Pursuant to the foregoing, Mr. Wagner presented the following pre-trial exhibits to the Reporter: [111])

“Amendment 1 to Revised Administrative Order No. 17,” “Order defining and delimiting certain Functions and Powers of Officers and Employees” dated October 2nd, 1942, signed Leon Henderson, Administrator, was marked Plaintiff’s Pre-Trial Exhibit 7-(a) and also marked “and trial”;

Document entitled Rev. Gen. Order 3, “Representation of Administrator in Court proceedings service in process”, dated June 10th, 1943, signed George J. Burke, Acting Administrator, was marked Plaintiff’s Pre-Trial Exhibit 7-(b), and also marked “and trial”;

Document entitled “Administrative Order No. 4, Part I, Supplement No. 7, Basic Field Enforcement Organization and Authority”, dated December 4, 1943, and signed Chester Bowles, Administrator, was marked Plaintiff’s Pre-Trial Exhibit 7-(c), and also marked “and trial”;

Document dated October 23, 1943, headed “Memorandum”, to All Chief Attorneys, All Chief Enforcement Attorneys, All District Officers”, from Ben C. Duniway, Regional Attorney, etc., headed “Decentralization” and not signed, was marked Plaintiff’s Pre-Trial Exhibit 7-(d), and also marked “and trial”; and [112]

Copy of teletype dated 6-4-43, to McDannell Brown, Chief Enforcement Attorney, Portland District Office, OPA, and signed John T. McTernan,

Regional Enforcement Attorney, was marked Plaintiff's Pre-Trial Exhibit 7-(e), and also marked "and trial.")

PLAINTIFFS' PRE-TRIAL AND TRIAL
EXHIBIT NO. 7 (a)

"Part 1305—Administration

"(Amendment 1 to Revised Administrative
Order 1)

"ORDER DEFINING AND DELIMITING CER-
TAIN FUNCTIONS AND POWERS OF
OFFICERS AND EMPLOYEES

"Paragraphs (a) and (c) of Section 1305.2 are amended to read as set forth below:

"Section 1305.2 Order defining and delimiting certain of the functions and powers of officers and employees—Institution of civil proceedings. The General Counsel or the Acting General Counsel, the Associate General Counsel or the Acting Associate General Counsel, the Assistant General Counsel in charge of the Enforcement Division or the Acting Assistant General Counsel in charge of the Enforcement Division, all Regional Attorneys or Acting Regional Attorneys and all Regional Enforcement Attorneys or Acting Regional Enforcement Attorneys are authorized to institute, in the name of the Administrator, appropriate civil actions or proceedings; and any of them may authorize any other attorney employed by the Office of Price Administration to institute any designated civil action or proceeding. Except as herein provided, no other

officer or employee of the Office of Price Administration, whether employed in the principal office in Washington, D. C., or in any regional or field office, has authority to institute proceedings on behalf of the Administrator.

“(c) Appearance for the Administrator. The General Counsel or the Acting General Counsel, the Associate General Counsel or the Acting Associate General Counsel, and the Assistant General Counsel in charge of the Court Review, Research, and Opinion Division or the Acting Assistant General Counsel in charge of the Court Review, Research, and Opinion Division are each authorized to appear for and represent the Administrator or the Office of Price Administration in any action or proceeding instituted against the Administrator or the Office of Price Administration in the Emergency Court of Appeals; and any of them may specifically authorize any attorney employed by the Office of Price Administration to appear for and represent the Administrator or the Office of Price Administration in any such action or proceeding. The General Counsel or the Acting General Counsel, the Associate General Counsel or the Acting Associate General Counsel, and the Assistant General Counsel in charge of the Enforcement Division or the Acting Assistant General Counsel in charge of the Enforcement Division are each authorized to appear for and represent the Administrator or the Office of Price Administration in any other action or proceeding; and any of them may specifically authorize any attorney employed by the Office of Price

Administration to appear for and represent the Administrator or the Office of Price Administration in any other action or proceeding.

“(d) Effective date. * * *

“(1) This Amendment No. 1 (Section 1305.2 (a), (c) to Revised Administrative Order No. 1 shall become effective this 2nd day of October, 1942.

(Pub. Law 421, 77th Cong., WPB Dir. 1 7 F. R. 562, Supp. Dir. No. 1A, 7 F. R. 698, 2229, 2729; Supp. Dir. 1B, 7 F. R. 925, 1493; Supp. Dir. 1C. 7 F. R. 1669; Supp. Dir. 1D, 7 F. R. 1792; E. O. 9125, 7 F. R. 2719; Supp. Dir. 1E, 7 F. R. 2965; Supp. Dir. 1F, 7 F. R. 3362; Supp. Dir. 1H, 7 F. R. 3478, 3877, 5216, 6211; Supp. Dir 1G, 7 F. R. 3546; Supp. Dir. 1J, 7 F. R. 5043; Supp. Dir. 1L, 7 F. R. 7200, 7281; Supp. Dir. 1M.

“Issued this 2nd day of October 1942.

“LEON HENDERSON,
Administrator.

“(F. R. Doc. 42-9835; Filed, October 2, 1942; 4:51 p. m.)”

PLAINTIFFS' PRE-TRIAL AND TRIAL
EXHIBIT NO. 7-(b)

Federal Register, Volume 8, Number 116, Washington, Saturday, June 12, 1943, Page 8207:

“(Rev. Gne. Order 3)

“REPRESENTATION OF ADMINISTRATOR
IN COURT PROCEEDINGS SERVICE OF
PROCESS

“General Order No. 3 is revised and amended to

read as follows: Price Administrator by the Emergency Price Control Act of 1942, as amended, and Executive Orders 9125, 9250, 9280 and 9328, the following order is prescribed:

“(a) Institution of and intervention in civil proceedings. The General Counsel, the Director of the Enforcement Division or the Acting Director, the Regional Attorneys or the Acting Regional Attorneys, and the Regional Enforcement Attorneys, are each authorized to institute and intervene in appropriate civil actions or proceedings, in the name of the Price Administrator; and any of them may authorize any other attorney employed by the Office of Price Administration to institute or intervene in appropriate civil actions or proceedings in the name of the Price Administrator. Except as herein provided, no other officer or employee of the Office of Price Administration, whether employed in the principal office in Washington, D. C., or in any regional or field office, has authority to institute or intervene in proceedings on behalf of the Price Administrator.

“(b) Service of process upon the Administrator. Service of process upon the Price Administrator may be made by serving him personally, or by leaving a copy thereof at the Office of the Secretary, Office of Price Administration, Washington, D. C., No other officer or employee of the Office of Price Administration, whether employed in the principal office in Washington, D. C., or in any regional or field office, is authorized to accept service of process on behalf of the Price Administrator or enter his

appearance in any action or proceeding, except as herein provided.

“(c) Appearance for the Administrator in defensive suits. The General Counsel or the Acting General Counsel, the Director of the Enforcement Division or the Acting Director, and the Assistant General Counsel or the Acting Assistant General Counsel in charge of the Court Review, Research and Opinion Division are each authorized to appear for and represent the Price Administrator or the Office of Price Administration in any action or proceeding instituted against the Price Administrator or the Office of Price Administration in the Emergency Court of Appeals and in proceedings for the review of determinations of the Emergency Court of Appeals in the Supreme Court; and any of them may specifically authorize any attorney employed by the Office of Price Administration to appear for and represent the Price Administrator or the Office of Price Administration in any such action or proceedings. The General Counsel or the Acting General Counsel, and the Director of the Enforcement Division or the Acting Director are each authorized to appear for and represent the Price Administrator or the Office of Price Administration; and any of them may specifically authorize any attorney employed by the Office of Price Administration to appear for and represent the Price Administrator or the Office of Price Administration in any other such action or proceeding.

"Issued and effective this 10th day of June 1943.

"GEORGE J. BURKE,

Acting Administrator.

"(F. R. Doc. 43-9454; Filed, June 10, 1943;
3:51 p. m.)"

PLAINTIFFS' PRE-TRIAL AND TRIAL
EXHIBIT NO. 7-(c)

ADMINISTRATIVE ORDER NO. 4,
PART I, SUPPLEMENT NO. 7

Basic Field Enforcement Organization and
Authority

1. Purpose. The purpose of this Order is to define the organization and authority of regional enforcement divisions and district enforcement Sections.

2. Regional Enforcement Division.

A. Organization. The Regional Enforcement Division, under the direction of the Regional Enforcement Executive, shall operate through six sections. These sections, corresponding to the National Office Divisions, Shall be:

1. Food Enforcement Section
2. Apparel and Industrial Materials Enforcement Section
3. Fuel and Consumer Goods Enforcement Section
4. Rent and Services Enforcement Section
5. Field Operations Section
6. Litigation Section

B. Functions.

1. Regional Enforcement Executive. Subject to the provisions of Administrative Order No. 4, Part 1, (Revised), the Regional Enforcement Executive is responsible for the direction and conduct of all enforcement activities in the region.

2. Commodity Sections. Each regional commodity section shall be given the widest authority and responsibility in the supervision, direction and conduct of enforcement activities in its respective commodity field. It shall (a) adapt national programs to fit regional characteristics, develop supplementary regional programs as needed and direct the execution of all enforcement programs; (b) supervise commodity enforcement activities to insure uniformity of action and adherence to national and regional policies; (c) direct the allocation of manpower within allotted percentages; and (d) assist in the conduct of significant cases and keep the district enforcement staffs fully informed of enforcement and regulation developments.

3. Field Operations Section. This section shall be the staff assistants of the Regional Enforcement Executive and shall be responsible for field organizational and general operating problems, general coordination of enforcement problems crossing commodity lines, including those in ration banking procedures, counterfeiting, safeguarding of ration currency, reporting and statistics, and training procedures and programs.

4. Litigation Section. This section shall have general responsibility for the technical conduct of

judicial proceedings and administrative sanction proceedings within the region. It may participate in or conduct litigation either cases as it may be specifically authorized to handle by the National Office.

3. District Enforcement Section

A. Organization. The District Enforcement Section, under the direction of the District Enforcement Attorney, shall operate through four commodity units, in addition to the office of the District Enforcement Attorney. These units shall be:

1. Food Enforcement Unit
2. Apparel and Industrial Materials Enforcement Unit
3. Fuel and Consumer Goods Enforcement Unit
4. Rent and Services Enforcement Unit

Wherever possible, enforcement attorneys shall be assigned full-time to a specific enforcement unit; in smaller offices, however, some enforcement attorneys may be assigned to handling the litigation and similar activities of more than one commodity unit. In those district offices where a commodity unit is of less than full-time importance for one investigator, that commodity field, to assure continuity of action, shall nevertheless be assigned to an investigator in addition to his other duties. Special investigators assigned to the district office with territorial responsibilities extending beyond the district shall be attached to the appropriate commodity unit and shall be subject to the direction of the regional office commodity section.

B. Functions.

1. District Enforcement Attorney. Subject to the provisions of Administrative Order No. 4, Part I (Revised), the District Enforcement Attorney is responsible for the direction and conduct of all enforcement activities in the district. Through his staff he shall coordinate the operations of the commodity units, including reporting and statistics, and train investigators and attorneys. His function relating to recruitment, training, reporting, and other operating problems crossing^e commodity lines may be performed through a Chief Investigator, if the District Enforcement Attorney so determines.

2. Commodity Units. Each district commodity unit shall be given the widest authority and responsibility in the conduct of enforcement activities including the ascertainment and investigation of violations, the selection and application of appropriate sanctions to the extent that such authority has been delegated to the district office, and the control of investigative time devoted to various commodity fields to meet allocated percentages.

4. Field Stations. Wherever important manufacturing, producing or wholesale activities are centered in cities other than the city in which the District Office is located or where the district extends over a particularly wide area the District Enforcement Attorney may, with the approval of the District Director, Regional Enforcement Executive and the Regional Administrator, assign investigators to be stationed (as duty stations) at a defense-rental area office or at a local board in

such city. Investigators assigned to these stations shall, so far as practicable, be given specific commodity responsibility, shall receive all assignments from and report exclusively to their supervisor in the district office enforcement staff, and shall not accept assignments from the local board or area rent office staffs without authority from their district office supervisor.

5. Authority to Take Enforcement Action.

A. Authority Retained in the National Office.

1. Appeals. All appeals will be considered and many will be handled in the National Office. Notice of any appellate step taken against the Administrator, together with all pertinent documents, shall be forwarded promptly to the National Office, and no appellate step on behalf of the Administrator shall be taken without prior clearance by the National Office.

2. Defensive Suits. In all cases brought against the Office of Price Administration or its officers or employees for acts done or contemplated in the performance of their duties, the National Office shall be notified immediately and all available information and documents relating to the suit shall be forwarded to it.

3. Special Cases. Exclusive authority to handle various enforcement activities may be reserved by the National Office either in enforcement instructions or by specific instruction in any particular matter.

4. Briefs and Memoranda of Law. All briefs

and memoranda of law on questions of national importance will be prepared by or under the direction of the Enforcement Department of the National Office.

B. Regional Offices. Except as provided in paragraph A, authority to conduct all enforcement activities, including the institution of litigation and the referral of criminal cases to United States Attorneys, is delegated to all regional offices.

C. District Offices. The Regional Enforcement Executive is required to delegate authority to conduct all enforcement activities, including the institution of litigation and referral of criminal cases, to all district offices adequately staffed to assume these responsibilities. The power to handle any specific matter or litigation of regional or national importance is reserved to the Regional and National Offices.

D. Delegation within Regional and District Offices. Commodity chiefs in the regional and district offices should be given very broad responsibility and authority in handling enforcement activities within the commodity fields. Similarly, investigators should be given authority to close out cases where no violations are disclosed, to issue admonitory letters over the signature of the District Enforcement Attorney, to conduct compliance conferences, prepare license warning notices, conduct treble damage settlement negotiations subject to the final approval of the District Enforcement Attorney, and perform such other functions as may be feasible, including the submission of evidence in

and conduct of administrative sanction proceedings. Authority so delegated shall be accompanied by instructions to insure that actions taken under the delegation are consistent with enforcement policies and practices within each office among all offices.

6. Relations with Local Boards. Complaints of price violations by retailers in fields in which price panels are authorized to function shall be referred to the appropriate price panel unless the district director concerned has determined that the price panel is not effective, or the complaint is incident to other enforcement operations. Complaints of consumer rationing violations should be referred to the appropriate local board if the board is in a position to take effective action to dispose of the violation.

Cases which price panels refer in accordance with established procedures, to the district office enforcement staff for actions shall be given priority in handling.

CHESTER BOWLES,
Administrator

December 4, 1943.

PLAINTIFF'S PRE-TRIAL AND TRIAL
EXHIBIT No. 7-(d)

April 23, 1943

Memorandum

To:

All Chief Attorneys
All Chief Enforcement Attorneys
All District Officers

From:

Ben C. Duniway
Regional Attorney
John T. McTernan
Regional Enforcement Attorney

DECENTRALIZATION

Last January the District Offices were given authority to dispose of cases by all methods short of sanction without clearance from the Regional Office. This authority included disposition by dismissal after investigation, closing by compliance conference or warning letter, settlement by contribution or compromise of the Administrator's cause of action. Subsequently authority to issue license warning notices was given to all District Offices with the exception of Spokane, Klamath Falls, and Sacramento. Effective immediately all District Office will have authority to institute litigation for the purpose of invoking sanctions in all types of cases except criminal cases.

(This memorandum covered a great many matters pertaining to office organization and all is de-

leted save and except that pertaining to the delegation of authority to institute actions, found on page 6 as above.)

PLAINTIFF'S PRE-TRIAL AND
TRIAL EXHIBIT No. 7-(E)

TELETYPE

8PD SF 6-4-43

Mr. McDannell Brown, Chief Enforcement Attorney, Portland District Office, OPA. Effective immediately your office will have full authority to authorize and initiate sanction cases in accordance with the provisions of memorandum of April 23 announcing the enforcement program. It is felt here that you personally must play an important part in this work in order to bring to bear upon the problems presented your maturity of judgment and experience as well as to supervise and develop the members of your staff. We shall expect that all sanction cases initiated in your district will have been discussed by you with the attorney handling the case.

JOHN T. McTERNAN,
Regional Enforcement
Attorney

Mr. Gentner: The second point goes to the merits of this controversy, and I might say to the very heart of the controversy, and that affects the contention on which this entire action is based.

The defendants claim that under the regulation no fully-operated rate is provided for; in fact, a fully-operated rate is prohibited by the terms of the regulation; and, therefore, that there is neither any ground for any action here, nor any violation disclosed, nor any evidence of any violation before the Court. Will the Court care to hear me?

The Court: You have witnesses here on one fact question—excessive wear and tear, as I understand?

Mr. Gentner: Well, that would become operative if—you see, the point is that both theories, of course, could not prevail. If the plaintiff established, as Mr. Wagner has stated, that there is a fully-operated rate in effect as of March 31, 1942, that settles the matter. If, however, there is no such rate established, then that also settles the matter, one way [112½] or the other.

The Court: Well, where does the extraordinary wear and tear come in, in mitigation, to use his word, as used in the pre-trial?

Mr. Gentner: Well, if a violation were established, then we would be entitled to an offset as to unusual wear and tear.

The Court: To the extent of the actual expenditures which we were able to establish, that is true. I think if you have witnesses here you had better put them on. My idea about this case, my hope about it at the end of it is to make findings of fact on everybody's contention, as I did in the Wheeler case.

Mr. Gentner: Yes, your Honor.

The Court: So there will be a record, as you might say, in the alternative, before the Circuit Court of Appeals, should there be an appeal.

Mr. Gentner: Very well, your Honor. I will ask Mr. Kuckenberg to take the stand, then.

HENRY KUCKENBERG

was thereupon produced as a witness in behalf of the defendants and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Gentner:

Q. Your name is Henry Kuckenberg? [113]

A. Yes, sir.

Q. And you reside here in Portland, do you, Mr. Kuckenberg?

A. Yes.

Q. You are a member of the partnership known as Kuckenberg Construction Company, defendants in this case?

A. Yes, I am.

Q. And did you have, during the years 1942 and '43, charge of the company's operations and office?

A. Yes, I did.

Q. Would you rather specify the nature of your duties, Mr. Kuckenberg? Were you a general manager or how?

A. Yes; I am the manager of all operations.

Q. In connection with the contract with A. J. Goerig, are you familiar with that?

A. Yes, I am.

Q. And was that negotiated with you?

A. Yes, with me personally.

(Testimony of Henry Kuckenberg.)

Q. The original contract, which is entitled Defendants' Exhibit 24, Pre-Trial Exhibit 24, that is the contract dated November 30th, 1942. That was signed by yourself, I assume, was it not?

A. Yes, it was.

Q. That covered rental of certain construction equipment, did it not? A. Yes. [114]

Mr. Gentner: Is that Pre-Trial Exhibit available?

Q. This is also signed by A. J. Goerig, I notice, and it says "Accepted. G. W. Walsh." Now could you state, Mr. Kuckenberg, who made the representations to you in regard to the nature of the soil conditions up there on this job that induced you to rent this equipment to A. J. Goerig?

A. Well, Mr. Walsh first came to our office representing Mr. Goerig and requested the rental of certain equipment for this particular job, and while requesting the rental of this equipment we discussed, or he told us the conditions under which the equipment would be working.

Q. And what conditions were represented to you as obtaining?

Mr. Wagner: Objection. Mr. Walsh is available and I think that if the question here as to the conditions or representations that go actually to establishment of the fact, the ultimate fact we are getting at, this witness' testimony would purely be hearsay.

The Court: He may answer, subject to the objection. I wonder who this Walsh was. Is he going to be a witness for the defendants?

(Testimony of Henry Kuckenberg.)

Mr. Gentner: Not for our side, your Honor.

The Court: Are you intending to call Walsh?

Mr. Wagner: No, your Honor.

The Court: I wonder if he is the man who was a witness in a contract case I tried here last fall. Wait until I [115] think of the name of it. What was the name of that man?

The Witness: Elliott Construction Company?

The Court: There is nobody in my staff good at remembering names. Elliott Construction Company?

The Witness: Yes.

The Court: Is that the same Walsh?

The Witness: I rather think it is—kind of a heavy-set man.

Mr. Gentner: Q. What did Mr. Walsh represent conditions would be on this job?

A. Well, it was represented to us that it was a normal job; that is, that the wear would not be excessive; that it was loamy soil, with some gravel in it—a very desirable job for a carryall and tractor operation.

Q. Based on that, then, you entered into this contract to rent the equipment, did you?

A. Yes, sir.

Q. And did you go up there yourself after the equipment went up there on the job?

A. Yes, after the equipment had worked there, oh, a week or ten days, I went up there.

Q. And what condition did you find?

A. Well, the equipment was in very bad condition. The soil condition was entirely different. It

(Testimony of Henry Kuckenberg.)

was a glacial soil condition there. The sand was very sharp and very erosive, [116] and the gravel and sand were both very tight. It was rather a cement gravel, and we found that they were excavating small hangars out of a bank where planes would eventually go into and these hangars were approximately 200 feet in diameter and they were circular and they were attempting to excavate this material, going around in a circle, with our equipment and with a tractor in the front and a carryall and a pusher cat. They have an overall length of approximately 75 feet and they were trying to excavate that amount of circle in a 200-foot diameter circle.

Mr. Gentner: Your Honor, I have here a picture I located since the pre-trial which accurately shows the setup of a tractor, carryall, a tractor and the manner of operation. This is done at the shipyard here, one of these. I think this would give the Court a better idea than any picture in the pre-trial there. I didn't find it at that time and it would really disclose what we are talking about, and the length of it. I would like to offer that in evidence.

Mr. Wagner: No objection.

(Thereupon the picture of "Caterpillar" Diesel D8 Tractors and LeTourneau Carryall Scraper, so offered, was received in evidence and marked Defendants' Exhibit 32.)

(Testimony of Henry Kuckenberg.)

Mr. Gentner: Q. Referring to Exhibit 32, you say the over- [117] all length from the beginning to the end is about how much? A. 75 feet.

Q. About 75 feet. And this combination of two tractors and the carryall is constructive for what type of operation, circular or straight-ahead operation?

A. Straight-ahead operation is the one that you can really successfully defend.

Q. Can you explain to the Court why that is?

A. Well, there would be one pulling and the other pushing the scraper at an angle. The one pulling at an angle and the one pushing at an angle just cramps everything and tears it to pieces.

The Court: Which piece do you call the carryall?

A. The one in the center; the one that loosens the dirt, and the other is the tractor.

The Court: What is the name of that preacher?

A. Bob LeTourneau.

Mr. Gentner: Q. This is LeTourneau, is it?

A. Yes; that is a LeTourneau scraper.

The Court: Did you read the article about it?

A. Yes.

Mr. Gentner: Yes, I did, your Honor. It is quite an article, too.

Q. What is the weight of one of these carryalls?

A. The carryall weighs about 35,000 pounds empty. [118]

Q. Loaded?

(Testimony of Henry Kuckenberg.)

A. Well, it holds about eighteen to twenty-five yards of earth, at about 2,500 pounds per yard.

Q. It might run as much as thirty tons of load on top of seven and a half tons of scraper?

A. That is the scraper line, and each tractor weighs about 40,000 pounds each.

Q. And the weight, this weight that you have described on these carryalls, is borne on tires, is it not? A. On rubber tires.

Q. And these carryalls are also referred to as cans, are they not? A. That is right.

Q. What is the effect of loading in a circle, if you will explain, on the carryalls?

A. Well, it cramps them. You have a pulling action and a pushing action and it just cramps the whole thing, and it breaks them open on the side, and in loading and turning, why, it breaks the cable because your cable tightens up the slack as you go around the curve and you have no control of it really. Then you break tongues on your scraper; you break your drawbars and your tractor, and it is just very expensive operation, and it is an unnatural operation for that type of equipment.

Q. What effect does it have upon the body of the carryalls? [119]

A. Well, it breaks the seams open and it throws it out of alignment. The entire frame from it has that effect on it.

Q. Racks the frame, does it?

A. Racks the entire frame.

(Testimony of Henry Kuckenberg.)

Q. And these carryalls have at the bottom what is known as a scraper, do they not?

A. A cutting edge.

Q. How do they operate?

A. That is with cable.

Q. I mean, how does dirt get into the carryall?

A. Well, there is a cutting edge. The cutting edge is dropped down. That is in the front of the entire bowl.

Q. That is at the bottom?

A. Yes, at the bottom of the entire bowl, as it pulls the head up; that is the cutting edge, and the dirt ploughs into it.

Q. What effect does that circular loading have on the tires?

A. If you cramp your tire rolling ahead they push over to the side with that enormous weight on top of it. It has a tendency to tear the tires almost off the rims. In fact, several times it pulled the rim locks off the siding and blew the tires out.

Q. What do these tires cost apiece.

A. Approximately \$500 each.

Q. Now on this particular job what effect did this circular [120] loading have upon the tires, insofar as racks were concerned?

A. Well, pushing the scraper over to the side the racks would get in the center of the back tires, because the tires were all dual tires on this particular equipment and getting in between the two tires in operation it would have the tendency to blow the tires out.

(Testimony of Henry Kuckenberg.)

Q. And on this job what conditions were there that affected the tracks and their life?

A. Well, the particular material that we were working in wore out tracks and the rollers and sprockets and idlers, in approximately 500 hours of operation, whereas normally we would get from 3,000 to 5,000 hours, which is an average of about 4,000 hours. An hour wear was very excessive on this particular job.

Q. What was the condition of the equipment, tractors and carryalls when they went on this job?

A. They were all in excellent condition.

Q. Well, can you specify? Were any of them new?

A. One of the tractors and carryalls was practically new. It had been used on our Spokane contract; oh, possibly sixty days before it came on this particular contract.

Q. Can you state whether or not any of this equipment was overhauled before being taken up there?

A. It was all overhauled, had to be in shape. I would say it was in 90 per cent condition when it went up there—all of [121] it.

Q. Can you describe the conditions that did affect the life of the track assembly on the tractors?

A. Well, the soil condition was the main factor in there. The tractors—this was not a tractor and carryall job at all. It was a job that should have been done with a shovel and rubber-tired trucks,

(Testimony of Henry Kuckenberg.)

because of the excessive wear on tracks and rollers and sprockets and other wearing parts.

Q. Now when you found this condition to exist, what took place?

A. Well, after our equipment had operated up there about a week or ten days we had all this breakage, this unusual breakage, we went up there and conferred with Goerig's men, and asked them to come over, and I believe that they finally came to Portland. Then we had a meeting here in Portland after we had been up there and we shut the operation down.

Q. You closed the operation down?

A. We closed the operation down, and Goerig said we would meet here in Portland. Then we met here at the Benson Hotel in Portland and they admitted then there was an unusual condition there and an unusual wear on our equipment.

Q. Did they also admit misrepresenting the contract?

A. Yes, they did. And we covered that in our addendum to the contract, which they signed at the time.

Q. This Pre-Trial Exhibit 25, dated January 9th, 1943, that is what you refer to? [122]

A. Yes, that is it.

Q. Signed by yourself and A. J. Goerig?

A. Yes, sir.

Q. Now as a result of that meeting did you state that you would refuse to continue the operation of the equipment up there?

A. Yes, we did.

(Testimony of Henry Kuckenberg.)

Q. And what was the result of this conference and their appraisal?

A. We told Goerig that the only fair thing was they should pay for the unusual wear on——

Q. Let me ask you this, Mr. Kuckenberg: When you were to continue up there what did you do?

A. Well, we wanted to take our equipment off but it was a war job up there, one that had to be continued, and they had no other equipment available, so they said, and they said that they were willing to pay something for the additional wear and tear, and we suggested that they just pay for the parts that we put on there, that our superintendent on the job and their man would agree upon were due to excessive and unusual wear and tear, but they wanted——

Q. That is, the actual cost, the actual expenditures?

A. Yes; but they wanted something definite. They made us an offer of \$2.00 an hour for the unusual wear and tear, and finally we agreed upon that. [123]

Q. Now did you discuss this matter with the local office of the OPA?

A. Yes. Before we entered into this we had about a two-days' session here. I think—yes, we were about two days here together, and during that discussion, why, we called the Office of Price Administration and asked them just how we could handle this, and they told us to draw—to come to some agreement on a price and then draw up an agree-

(Testimony of Henry Kuckenberg.)

ment and have both parties sign it, and that was the proper way to handle it, which we did.

Q. Now then, you continued under that contract, then, did you? A. Yes, we did.

Q. What conditions existed then on that job, from then on?

A. Well, we had many, many breakdowns. Our equipment was down a good portion of the time for repairs, and finally we got work of our own, and our contract was that we had rented them the equipment up there for sixty days and we had the right, after that period, to recall our equipment. So we had other work for it here and told them that we would give them a reasonable length of time in which to secure other equipment, so I think we wrote them a letter, or I wrote them and told them we would give them two weeks in which to get other equipment, and at the end of that time we would like to get our own equipment back. So we sent our trucks up there to get it, and the Army Engineers stepped in and wouldn't let us [124] take the equipment off the job until it was finished.

Q. Was there, in addition to the unusual conditions, a condition occurring by reason of the Goerig people themselves?

A. Well, yes. When we drew up this addendum to our original contract we insisted that we send a man up there to watch the operation and to see that the equipment was being properly operated; that they were running two shifts, and our man was

(Testimony of Henry Kuckenbergl.)

there a good part of the two shifts but no always, but it seemed that any time he would leave, why, they would go right back into an operation that would damage the equipment. As long as he was there and watching it he would keep them pretty well straightened up, as much as possible, and keep a ripper on there. That was another thing that was very hard on the equipment. They had an idea it was economical not to rip this material because it entailed the use of one more tractor, but just as soon as he would leave them and quit the ripping they would go right on, and it was hard and very severe on the equipment.

Mr. Gentner: Your Honor will recall, at the time of the pre-trial I had here the original payrolls, both from Bremerton and from Portland, and the original daily report sheets, all of the original invoices on this job, and due to the great volume of them and the difficulty of having the Reporter designate them, your Honor suggested that we take them back with us and offer them at the trial. [125]

Now I have here all of the original payrolls, both at Bremerton and at Portland, that relate to this matter of unusual wear and tear. We have our daily report sheets here for every day on the job. We have here all of the time sheets; we have here all of the invoices, covering all parts purchased; and, in fact, for every item as disclosed by our summaries that we offered in evidence. We have the Defendants' Exhibit 11, Summary of Invoices. Then

(Testimony of Henry Kuckenberg.)

we have also a recap cost summary. We have Defendants' Exhibit 8, the cost summary, Bremerton Airport rental. We have Exhibit 9, the Portland payroll totals, and Exhibit 10, the hauling charges, and we are offering all of these documents in evidence in support of our summaries that we have introduced and offered.

Q. Mr. Kuckenberg, do these yellow sheets also have any connection, or are they just your work sheets?

A. I think they are just work sheets.

Mr. Gentner: Work sheets. I have here two folders for these. I could ask the witness to identify these.

The Court: Mr. Person will mark them. There is no dispute about them, is there, Mr. Wagner?

Mr. Wagner: Not as to their identity.

The Court: No.

Mr. Wagner: I don't like to be difficult in connection with this evidence. I realize it is difficult. It is a difficult problem for Mr. Gentner and Mr. Kuckenberg probably, and [126] I want to be as reasonable as I can, but I would like to reserve a standing objection, and in connection with the identity I would like to say this: That Mr. Kuckenberg's operations, as I understand it, include other jobs. His operations are very extensive and his equipment bore a great many more pieces than just these few that are involved here, and those other pieces of equipment were also being operated on other jobs at the same time. Now just exactly how Mr. Gen-

(Testimony of Henry Kuckenberg.)

tner desires to apply, or have connected, this particular evidence to this particular job I don't know, but I think that was the point, the only point that is at issue here, as far as we are concerned.

The Court: Mr. Gentner, you will save Mr. Wagner's embarrassment by having the witness identify these two folders.

(The two folders were marked Defendants' Exhibits 33 and 34, respectively.)

The Court: Give them to the witness and have him tell what they are.

Mr. Gentner: Q. What is the first folder?

A. Exhibit 34——

The Court: One question covering both of them will be all right.

Mr. Gentner: Q. Will you kindly identify the contents of Exhibits 33 and 34? Will you kindly identify them?

The Court: You can ask him a leading question. You sum [127] up what is in there, Mr. Gentner.

Mr. Gentner: Q. Mr. Kuckenberg, you have in there—just go through that and tell what it is. That is the easiest way.

A. Exhibit 34 covers all the invoices for repairs that have been placed on the particular tractors that were used at Bremerton. I don't think they are all unusual, or are all charged to unusual wear and tear. I think a great many of them are just ordinary maintenance, but we have——

Q. Now in connection with that——

(Testimony of Henry Kuckenberg.)

Mr. Wagner: Let the witness go ahead.

Mr. Gentner: Just a minute.

Q. In connection with that Exhibit 8, called "Cost Summary", would you kindly give this to the witness. Let the witness see that. Did you make this segregation yourself of the invoices?

Mr. Wagner: Now wait just a minute, Mr. Gentner. Let the witness identify it. I would appreciate it if he would identify the folder.

Mr. Gentner: All right. Go ahead.

Mr. Wagner: In the first place, before you introduce any recapitulation of something.

Mr. Gentner: No. But that is along the line he was testifying to.

Q. Let me ask you this: Do the invoices that you have there correspond with the invoices that are shown on this Exhibit 8? [128]

A. Yes, they do.

Q. This summary? A. Yes, they do.

Q. In other words, what you have there is the invoices that you have on your summary, entitled Exhibit 8? A. Yes.

Q. That covers all of the repairs that were made on all of those pieces of equipment, both for unusual and ordinary wear and tear?

A. That is right.

Q. That is right, is it not?

A. Yes, that is correct.

Q. O. K. Now I have here Exhibit 9, showing summary of Portland payroll totals. Did you prepare that?

(Testimony of Henry Kuckenberg.)

A. Yes. It was prepared under my supervision.

Q. And do you have in those folders the payrolls, the original payrolls supporting the summary that you have here, Exhibit 9?

A. Yes. They are in this folder.

Q. Those are the payrolls supporting that?

A. Yes.

Q. All right. Now I have here Exhibit 11, called "Summary of Invoices". Was that prepared by you?

A. Yes; under my supervision.

Q. And are there in those folders the original invoices supporting the summary that you have made up there? [129]

A. Yes, sir.

Q. And here is Exhibit 10, hauling charges. Are the invoices in those folders supporting those?

A. Yes, they are.

Q. Now further, you have in there some daily report sheets. Would you describe what those are, who makes them up, and what they tell?

Mr. Wagner: May I interpose a question, first?

Mr. Gentner: Surely. Go ahead.

Mr. Wagner: In these summaries, Mr. Kuckenberg, I take it that these summaries are tabulations of all of the invoices in those respective folders; is that right?

A. That is correct.

Mr. Wagner: And I understood you to say that the invoices as contained in those folders, particularly in connection with repair bills, included not only those bills that were the result of extraordinary

(Testimony of Henry Kuckenberg.)

wear or unusual tear but also the ordinary operating and maintenance repairs?

A. That is correct.

Mr. Wagner: Is that right?

A. That is correct. That is covered by our summary here.

Mr. Wagner: Is there any description of those?

Mr. Gentner: Yes, there is.

Q. Now I will hand you Exhibit 26 and ask you, have you prepared that? [130]

A. That was prepared under my supervision also.

Q. Now that has a list, does it not, of each particular part that went to each particular tractor designated by number? A. That is correct.

Q. Each tractor and each carry-all bore a certain number, did it not? A. That is right.

Q. Numbered and designated on the job. Now that list there segregates each part to the particular machine that it was applied to, does it?

A. That is right.

Q. And did you make a segregation of the ordinary wear and tear from the usual wear and tear?

A. Yes. It was all made under my supervision.

Q. And who assisted you with that?

A. Lee Gordon, who was our General Superintendent, and Gordon Giebisch was the resident foreman or the superintendent on the Bremerton job. The three of us made it up.

Q. And you segregated the ordinary wear and tear from the unusual wear and tear, did you?

(Testimony of Henry Kuckenberg.)

A. Yes.

Q. And your summary covers that?

A. Yes, it does.

Q. Now tell about these daily reports.

A. These are daily reports that were made up on the Bremerton [131] job by the foreman who was in charge of the work.

Q. The first ones were made up by whom?

A. The first ones were made up by Lee Gordon, or under his supervision.

Q. That was up to about January what?

A. January 10th; up to January 10th, they were made by Lee Gordon, or under his supervision. Some of them were made under his supervision.

Q. He was the foreman or superintendent on the job?

A. Yes.

Q. And then, from then on to the end of the job they were made up by Gordon Giebisch, were they?

A. They were made up by Gordon Giebisch, yes.

Q. Who was superintendent on the job then?

A. Yes.

Q. These reports showing the—that is, what were they for? What took place?

A. I beg pardon?

Q. What took place on the job?

A. Yes. It is the delivery of the work, showing the equipment that was done at certain times, what was wrong with the equipment, and the time the equipment worked and the down time.

(Testimony of Henry Kuckenberg.)

Q. Now is there anything in those two folders that I haven't asked you about? I see you have the payrolls and the invoices.

A. I think you have covered it all. [132]

Q. And the daily reports. Now then, these summaries that you have, you segregated the ordinary from the unusual wear and tear. Now to your knowledge do they represent the actual expenditures on account of the unusual wear and tear on that job?

A. Yes, they do.

Q. And the prices for parts, are they what you actually paid for the parts?

A. Yes, they are.

Q. The labor was covered I assume by Union contracts?

A. Yes.

Q. And represents Union pay, the actual amount paid out?

A. Yes.

Q. And the actual hours put in on those tractors?

A. Yes, they do.

Q. How long have you been in the construction business, Mr. Kuckenberg, personally?

A. I have been in business myself since 1922.

Q. How long have you worked in the construction business?

A. Well, several years before the last war. Then I was in the Army during the last war, and then ever since then.

Q. And are you familiar with the average cost per hour for usual and ordinary repairs on the D-8 tractor?

A. Yes, I am.

Q. And what does that amount to for the running hour, working [133] hour?

(Testimony of Henry Kuckenbergl.)

A. For a tractor and a scraper?

Q. Yes. A. Ordinary?

Q. Ordinary wear and tear.

A. About a little over five dollars an hour.

Q. And what is the cost on this Goerig job, approximately?

A. Well, it runs just about the same. We have ordinary maintenance and repairs. We have spent \$33,750 for some 6,000 and some hours, and it run just very close to what our average cost would be.

Q. What was the total cost on the Goerig job?

A. The total cost was ninety thousand eight hundred —

Q. No, no. I mean for repairs?

A. The total cost for repairs was approximately sixty-seven thousand dollars.

Q. And what would that run per hour?

A. About ten dollars an hour.

Q. In other words, your cost on this job was double the ordinary cost, or \$5.00 an hour over the ordinary operating cost; is that right?

A. That is correct.

The Court: Did they lose money, Gentner?

Mr. Gentner: Yes, they did.

The Court: How much? [134]

Mr. Gentner: Well, we show that they paid out ninety thousand dollars in actual cash and took in ninety-five thousand, and then they had depreciation on their equipment, and the wear and tear. I think they got \$5,000 for the —that is what they

(Testimony of Henry Kuckenberg.)

had left after the job was over, and they had their equipment back in this shape it was in after being ruined in this fashion.

Q. That was up on the job from December until—— A. April.

Q. The end of April. How many dollars' worth of equipment was it?

A. Well, it would represent approximately \$200,000 worth of plant.

Q. Two hundred thousand worth of plant. I think the bare rental on that—what would it be?

A. Forty-six thousand OPA bare rental.

Q. OPA bare rental alone would make \$46,000 without anything more, and you got five thousand out of it? A. Yes.

Mr. Gentner: I think that is all. You may examine, Mr. Wanger.

Mr. Wagner: If the Court please, this case has been quite disconcerting in many aspects. At this particular time we have very, very many extensive records, had we know they existed.

Mr. Gentner: I had them here at the pre-trial, Mr. Wagner. [135]

Mr. Wagner: We certainly would have liked to have gone over them outside of the trial. I think that cross examination on such extensive records would require an awful lot of unnecessary time to the Court and also of counsel. I am suggesting this at this time: That we continue this matter in order that plaintiff and defendant may examine these

(Testimony of Henry Kuckenberg.)

records, and, if possible, come to some agreement as to what is ordinary wear and tear and what is extraordinary wear and tear, without having to go into any extended cross examination as to the facts on it. I think it can be done. We are not unreasonable and haven't been at any time in connection with the examination of records, and it would certainly save an awful lot of valuable time of the Court also, of respective counsel and witnesses, I believe.

The Court: I don't see how you can do that, Mr. Wagner, we have so many other things. I have to go away the first of the year. My calendar is all set up very close with that in mind.

Mr. Wagner: Very well.

Mr. Gentner: I might say to your Honor, the amount of the offset, the most they could be entitled to, would be thirteen thousand some odd dollars, and we show thirty-three thousand actual expenditures.

Cross Examination

By Mr. Wagner: [136]

Q. When this project, Mr. Kuckenberg, was first presented you for consideration were you given any blueprints, maps?

A. No, we were not.

Q. Information or data in writing?

A. No, we were not.

Q. You were not. It was purely a verbal conversation?

(Testimony of Henry Kuckenberg.)

A. Yes. I think the only thing we have was a map showing the location of the field.

Q. Showing the location?

A. Of the field.

Q. Did you give it consideration more than once before entering the contract?

A. No, I didn't. At that time all our work was rush work. We would be called in on a job and we would start possibly the same day, and that is the way this job went.

Q. How much work were you doing along about that time?

A. Well, it was really pretty quiet. We had a good lot of surplus equipment. We were not doing too much right at that particular time, and that was the only reason that we went up there, because previous to that we were quite busy.

Q. How much equipment do you have altogether?

A. You mean in dollars and cents?

Q. Well, in numbers of pieces. How many pieces of equipment?

A. That would be pretty hard for me to answer, Mr. Wagner, without checking. [137]

Q. Would you know approximately?

A. You mean tractors or something?

Q. How many tractors did you have at that particular time?

A. At that time we had approximately twenty tractors, possibly twenty or twenty-two.

(Testimony of Henry Kuckenberg.)

Q. About twenty-two?

A. That is correct.

Q. Tractors. And how many carryalls did you have then? A. Nine carryalls.

Q. Nine carryalls. What other types of equipment did you have?

A. We had shovels, trucks, in the ordinary——

Q. What do you mean by shovels, power shovels? A. Power shovels, tractor shovels.

Q. Gasoline? A. Gasoline or Diesel.

Q. Steam shovels? A. Gasoline or Diesel.

Q. Gasoline or Deisel. No steam? A. No.

Q. What other types of equipment?

A. Just the general run of contractors' equipment.

Q. I am just trying to find out how extensive your equipment is. At this particular time you mentioned a rubber——

The Court: Let's get at it this way: What portion of the total equipment was on this job? [138]

A. I would say a third of it.

Mr. Wanger: Q. About one-third of it?

A. Yes.

Q. And during the course of this job you had other equipment working also?

A. We had some working at Spokane. I don't think we had very much down here. I think most of the plant that we had at Portland went up to the Bremerton job and practically all of the rest of our plant was at Spokane. We might have had one or two tractors working in the shipyard. I don't

(Testimony of Henry Kuckenberg.)

remember exactly. But I do remember that most of our plant went up on this contract.

The Court: Where did you get your experience that you and your brother have in the construction? What organization did you come up through?

A. Through Warren Construction, previous to the war. Then after the war I was with Parker-Schram here about a year.

The Court: You worked with Nat Lynch?

A. Yes.

The Court: And Gill, and all of them?

A. Yes, previous to the war, and after the war I was with them on the contract between St. Helens and Scappoose, that 10-mile stretch.

The Court: With them over in Wyoming, at Casper?

A. Yes. I was at Casper previous to the war, though. [139]

The Court: Yes.

Mr. Wagner: Q. So that about one-third of your equipment was on the Bremerton job?

A. Yes.

Q. Now at the time they presented this job to you, you say it was a rush job? A. Yes.

Q. And you gave it consideration by discussing it with Mr. Walsh and by looking at the map?

A. Well, no. The map didn't enter into the job at all. The map was given to us so we could do whatever was necessary for our equipment there, and was given to the truck drivers that took the

(Testimony of Henry Kuckenberg.)

equipment up there. That is the only reason the map was given to us, showing the road up there.

Q. You discussed it with Mr. Walsh?

A. Yes.

Q. On more than one occasion?

A. No. I think it was just one occasion they came in there and told us what they wanted and, as I recall it, that was the only conversation we had about it.

Q. How much time elapsed between the time that you talked with Mr. Walsh and the time that you started shipping your equipment up there?

A. I think it was just a matter of signing the contract, and possibly a day. [140]

Q. A day?

A. Possibly. I think Walsh took the—we drew up an agreement immediately and I think he took it up to Seattle that same day. He had Goerig sign it and himself and sent it back to us, and the equipment started rolling out immediately.

Q. And how long was it after that that the equipment started working?

A. Well, I would say within a few days.

Q. Within a few days?

A. Uh huh; possibly as soon as we did get up there. It would take a day to get up there, possibly a day to hook up the tractor and carryall and get it ready for operation.

Q. O. K. And you supplied for this particular work of the——

(Testimony of Henry Kuckenberg.)

A. We supplied the equipment, the operators and the fuel, the maintenance and the repairs, everything necessary for its operation.

Q. And who supervised the operation?

A. They had their own superintendents. As far as the operation was concerned, they supervised that.

Q. Did you employ any maintenance men?

A. Yes.

Q. Aside from the operators? A. Oh, yes.

Q. How many?

A. Sometimes as many as five, and we sent mechanics from [141] Portland, from our Portland shop, oh, every time they would get stuck we would send men from Portland. We had two to five maintenance men on the work all the time, and then we sent as many as three and four from Portland up there.

Q. You have your own repair shop?

A. Yes.

The Court: Is that located out there by your plant out in Parkrose?

A. Yes. We have eight acres out there and we have a large shop and a storage space out there.

Mr. Wagner: Q. How soon after the commencement of your operations up there did you first notice that equipment was breaking.

A. Well, when I first noticed it was the first time I went up there. That was approximately two weeks after we had started.

Q. That would be when?

(Testimony of Henry Kuckenberg.)

A. That would be prior to the end of the year, the end of '42.

Q. During December?

A. It would be during December.

Q. Along before Christmas sometime?

A. Well, I would have to look at the records to tell exactly. It was sometime before the first of the year. I do know that Giebisch, Gordon Giebisch went up there the 10th of January and we shut down, and we shut down for approximately a week [142] before he went up there. That is my recollection, without looking at the records. I could look at the records and tell you exactly.

Q. Will you do that?

A. Yes. We started operation on December 12th.

The Court: Look it up during the noon hour. Go ahead to another question, Mr. Wagner.

Mr. Wagner: Q. When you arrived up there, Mr. Kuckenberg, just exactly what took place? What did you do?

A. When I arrived up there the job was already shut down. Mr. Gordon had gone up ahead of me and had shut——

Q. Now by the job being shut down, what do you mean by that?

A. We just stopped our equipment from working. It needed repairs so bad we just shut it down really to get our equipment repaired.

Q. You shut the job down after you arrived?

A. No, I didn't.

(Testimony of Henry Kuckenberg.)

Q. After you arrived there?

A. No. I arrived I think the same day or the next morning, but most of the equipment was broken down from abuse, and we just shut the whole thing down and started repairing it. Then Mr. Gordon called me at Portland and I went up there in the hopes of seeing Goerig and pulling our stuff off. Then we decided we just wouldn't work under those conditions. We could not. [143]

Q. What was the nature of the operations at the time you arrived there?

A. Well, they were not going on at all. They were shut down.

Q. Well, what was the nature of the operations that had been going on then?

A. Well, they were becoming revetments.

Q. What do you mean by revetments?

A. Along the taxiing ways they went into the hillside and in place of being hangars they would have been they dug these hangars out of the bank. That was in case the field was bombed all the planes would not be out in the center of the field.

Q. How many of those were being built?

A. Oh, it would just be a guess on my part. I never did see the planes, but I would guess possibly they will get up to half a dozen in there.

Q. And how long a field was it to be, do you know that?

A. It is a standard field. They had 5,000-foot runways there. My recollection is they had two

(Testimony of Henry Kuckenberg.)

runways, cross runways; then they had a taxi way around it. It is a large field.

Q. Something in excess of a square mile?

A. The entire field?

Q. Yes. A. I would say so.

Q. Was the land wooded or what? [144]

A. Well, around, surrounding the field was wooded, yes, but not on the field. The field had been completed several years before this.

Q. It was an airfield there?

A. Yes; these revetments were a new part of the construction.

Q. And was a part of your construction work building additional runways?

A. Well, of course our work was just renting the equipment. We had nothing to do with the construction.

Q. Well, the work your equipment was doing?

A. Building what?

Q. Additional runways? A. No.

Q. Or additional runways? A. No.

Q. Taxi ways?

A. No. I think that they did—the waste material they took out of the hillside from the revetments, I believe they took some of it, the lengthways or taxi ways, and most of it, as I understood, went out there for waste.

Q. It had to be because of those revetments your equipment was used to build?

A. That is my understanding.

(Testimony of Henry Kuckenberg.)

Q. Did they dig them out?

A. No. They dug them out of the bank, out of the hillside. [145] The taxi way went along the way and there was a sloping hillside along the taxi ways. They just dug in to those hillsides, but they went out with a straight taxi way, or roadway, possibly some 50 or 100 feet. Then there was a round revetment there, or hangar, whatever you want to call it, and that was dug out of the bank. It started about 200 feet in diameter and the back cut was approximately 30 feet and the front possibly a 10-foot cut and that was sloped down so it made it smaller at the bottom.

Q. Your equipment had to take that excessive material where?

A. Well, they hauled it down beyond the taxi way to a dump they had there. It was, possibly, oh, I would say possibly a thousand to twelve hundred foot haul, fifteen hundred feet; then they got further as they went back away from there. The haul got longer.

Q. Did I understand you to say that each of those revetments had to be a 200-foot diameter?

A. At the top the cut was to be 200 feet in diameter.

Q. At the top?

A. At the top; and then they came down on a slope and they were possibly, oh, 100 feet in diameter at the bottom.

Q. Explain that a little bit more fully. I don't understand.

(Testimony of Henry Kuckenbergl.)

A. Well, you take any cut where there is a bank, there is a slope there and it would naturally be wider across the top than the bottom because it is funnel-shaped. Your slope [146] comes down on an angle.

Q. What you mean is that you have an ordinary cone that is inverted? A. That is right.

Q. And that was created by the operations of your machine? A. Yes.

Q. By digging around the base?

A. That is right. Uh huh.

Q. And then you had how many carryalls in operation up there—about four?

A. Yes; four.

Q. And they are all the same size?

A. Yes.

Q. And that size is indicated by the photograph that was introduced here?

A. Yes. Those are model W's. That is what those were up there.

Q. Now you mentioned soil conditions up there. Will you describe that a little bit more fully for us.

A. Well, if that soil condition there is a glacier formation it is very tight. It is very abrasive. It is composed of sand and gravel. In fact, it is so tight the only way you can really dig it efficiently, or economically at all, is to use a ripper in there; then the material is usually abrasive. [147]

Q. What is a ripper?

A. Well, a ripper is a large piece of equipment that has big teeth and these teeth dig in and rip it

(Testimony of Henry Kuckenberg.)

as they go along. It is handled in back of the tractor just like a big rooter plow, except it has three teeth on it.

Q. Did you employ any of that type of equipment up there at all?

A. We finally furnished them with a ripper after we had been up there for some time, but they wouldn't use it.

Q. What do you mean, they? A. Goerig.

Q. Goerig wouldn't use it?

A. Not all the time. We had to bring pressure on him most of the time to get him to use it. It necessitated the use of one more tractor and he was trying to, though it was more economical not to use it.

Q. Now you mentioned the fact that in operating this equipment in a circular manner that rocks would get in between the dual tires.

A. Uh huh.

Q. That often happens, doesn't it, Mr. Kuckenberg, in ordinary operations?

A. Yes, it does sometimes, but it is worse when you are cramping on, sliding on the tires rather than rolling them, because sliding forces them right in there. [148]

Q. And this equipment is built to be steered and can go in a circular manner, can it not?

A. It is not built for loading in a circle, no. It definitely is not. It is not common practice to do it where we get into a tight place like that, and in order to use that type of equipment we would use

(Testimony of Henry Kuckenberg.)

a dozer and push that equipment to the center where we could take a straight run at it.

Q. What kind of work did your contract call for in the outset?

A. I don't remember. I don't think it indicates any type of work. I think it is just a straight lease contract for rental of equipment.

Q. Rental of equipment?

A. That is right.

Q. And all that you knew was that is was to prepare——

A. No, no, that is not——

Q. And Mr. Walsh didn't tell you——

A. That is not quite right, Mr. Wagner.

Q. Mr. Walsh didn't tell you that it concerned the construction of revetments?

A. No, that is not right. He didn't say what type of work it was. He said that they were borrowing dirt and it was ordinary construction work.

Q. Now after you arrived there and the job was shut down, what occurred after that, Mr. Kuckenberg?

A. We tried to get in touch with Goerig and ask him to come [149] over there.

Q. Did you? A. Did I what?

Q. Did you get in touch with him?

A. Yes, we got in touch with him.

Q. How soon?

A. Well, I think the first day we were there.

Q. What took place then?

(Testimony of Henry Kuckenberg.)

A. He said that they would rather meet us in Portland; that they could not get away right that particular day or the following day, but they would come to Portland.

Q. And then you came to Portland?

A. Yes.

Q. Without letting your equipment——

A. Without renting it?

Q. Without letting your equipment commence operations again?

A. As I recall it, yes. The equipment was down until we had entered into this addendum to the contract.

Q. Now you had a conference with the Goerig people about the situation? A. Yes.

Q. And as a result of that conference you agreed with the, or the Goerig people agreed with you that some addition be allowed you on your rental?

A. We wanted to take our equipment off of there. I didn't [150] want it on there at all at any price, but they just stated, and begged us practically, that they had to have it there, and we finally told them that we would leave it there but we felt we should be compensated for any unusual conditions and that the job had been misrepresented to us, in the first place, and that should all be done in our addendum, and they signed it.

Q. Can you give me approximately the date of that conference?

A. Well, it would be sometime in January.

Q. It would be in January?

A. I don't remember the date.

(Testimony of Henry Kuckenberg.)

Mr. Gentner: Well, with reference to your contract, the addenda, can you fix the date? How was it in reference to that?

A. Oh, it was possibly three weeks or a month later than the original contract.

Mr. Gentner: No, no.

Mr. Wanger: Q. Than the original contract, and then the agreement for the additional, in connection with signing that would you say about that—a day before or two days before?

A. Before what?

Q. Before you signed the supplemental agreement for rental?

A. Two days before what?

Q. When this conference took place?

A. No. We signed it right there the same day.

[151]

Q. The same day?

A. Well, we were in conference possibly two days, as I recall. Then we drew up the agreement and it was signed right there.

Q. During that conference. Do you indicate it was during that conference you were in touch with the OPA? A. Yes.

Q. What office of the OPA?

A. The party that I talked to, I can't think of his name but he now is a professor at Reed College. I know him through that. I knew his name at the time. I don't know it now but he was head of the machinery, as I recall it.

(Testimony of Henry Kuckenberg.)

Q. Would it be Mr. Stewart?

A. Yes, Stewart.

Q. Blair Stewart?

A. Blair Stewart, yes.

Q. Now what——

A. The reason I know it was Mr. Stewart, we had other conversations with him about other matters, that is concerning the regulation.

Q. What regulation were you referring to?

The Court: Pardon me. We will have to recess now until two o'clock.

(Thereupon, at 11:45 o'clock A. M., a recess was taken until 2:00 o'clock P. M. of November 14, 1944, at which time Court reconvened. [152] and the following further proceedings were had herein:)

Mr. Gentner: If the Court please, on this pre-trial order there was a space at the end where we left off on page 5 and instead of rewriting another page I merely inserted the matter about any violation being willful, at the end of defendants' contentions on page 5, which is agreeable to Mr. Wagner. I furnished him a copy of the paragraph that has been inserted there. That takes care of that matter.

The Court: All right. I will sign it now. Mr. Kuckenberg was on the stand.

Mr. Gentner: Yes. Mr. Wagner has indicated that his cross examination of Mr. Kuckenberg will

be quite extensive and I have a number of witnesses here.

The Court: Yes.

Mr. Gentner: It will be agreeable to put them on and then Mr. Wagner can finish later.

Mr. Wagner: Very well.

The Court: All right. Put them on.

Mr. Gentner: Call Mr. Byrne. Take the stand.

E. E. BYRNE

was thereupon produced as a witness in behalf of the defendants and, having been first duly sworn, testified as follows: [153]

Direct Examination

By Mr. Gentner:

Q. Your name is Ed E. Byrne?

A. E. E. Byrne.

Q. E. E. Byrne. And what is your position, Mr. Byrne, or your occupation?

A. I am Manager of the Interstate Tractor & Equipment Company, Caterpillar tractor distributors.

Q. They are the sole distributors for this territory, are they not? A. Yes, sir.

Q. How long have you been in that particular line? A. Since 1931.

Q. And are you thoroughly familiar with operation of Caterpillar tractors? A. Yes, sir.

Q. And the normal life of various parts of Caterpillar tractors? A. Yes, sir.

(Testimony of E. E. Byrne.)

Q. Mr. Byrne, referring to Defendants' Exhibit 27, that is the lithograph of the Caterpillar D8 tractor, is it not?

A. It is a "Caterpillar" D8; that is correct.

Q. That shows, among other things, what is known as a track assembly, does it not?

A. Yes. The track assembly is the part the tractor runs on.

Q. Could you designate the various parts of the track assembly [154] on the various tractors?

A. The track assembly consists of two complete tracks that shows track warehouse forms, with track rollers, sprockets, two sprockets, two front idlers, and four top carrier rollers.

Q. Now Mr. Byrne, what is the average life of a track assembly on a "Caterpillar" D8 tractor under the normal operating conditions?

A. The average life is approximately 4,000 hours.

Q. 4,000 working hours?

A. Yes, sir. That is, operating hours.

Q. 4,000 operating hours, where the tractor is actually running and being used?

A. Yes, sir.

Q. Now there have been a large number of parts purchased from the Interstate Tractor & Equipment Company by Kuckenberg Construction Company for repairs on various tractors during the years 1942 and 1943. You are familiar with the billing to Kuckenberg Construction Company of the charges for those parts?

(Testimony of E. E. Byrne.)

A. I am not familiar with each individual billing. However, all of our parts are billed at OPA ceiling prices.

Q. And would you say the charges made by your company to the Kuckenbergl Construction Company for parts for these tractors were all OPA ceiling prices during that year?

A. Yes, sir. [155]

Mr. Gentner: You may examine.

Cross Examination

By Mr. Wagner:

Q. Mr. Byrnes, is it?

A. Byrne.

Q. Byrne? A. Uh, huh.

Q. You have price lists available for the parts, do you?

A. We have them at our office.

Q. You also sell tractors? A. Yes, sir.

Q. Complete? A. Yes, sir.

Q. And you have price lists for those?

A. Yes, sir.

Q. Do you know of your own knowledge at this time what prices are indicated for various pieces of equipment, such as a D8?

A. Approximately, yes.

Q. Approximately what is a D8 sold for?

A. Eighty-one hundred dollars.

Q. \$8,100? A. Yes.

Q. And is that inclusive of all standard equipment?

(Testimony of E. E. Byrne.)

A. That is the bare tractor itself.

Q. The bare tractor itself. Do you also know what the price [156] of a bulldozer is?

A. The bulldozer, less the power units, sells for a thousand and twenty dollars at the factory.

Q. What about extra equipment, such as with power units?

A. A machine equipped with two-drum power unit, that sells for \$720 at the factory.

Q. It sells for \$720?

A. At the factory.

Q. At the factory. But this machine does come equipped with it?

A. No, it does not.

Q. It does not. That is for a four-drum unit?

A. That is a two-drum unit.

Q. Two-drum. Do you know what the four-drum unit would take?

A. A four-drum power unit?

Q. Yes.

A. It sells for twelve hundred forty dollars at the factory.

Q. Do you carry any line of carryalls?

A. Yes, we do.

Q. Do you carry the LeTourneau line?

A. Not at the present time.

Q. Did you?

A. We did prior to March 1st, this year.

Q. During 1943, then, what did a Model "W" carryall sell for?

(Testimony of E. E. Byrne.)

A. Equipped for eight, eighteen hundred twenty-four. Tires [157] it sold for eighty-six hundred dollars.

Q. Did you make any sale of such equipment to Mr. Kuckenbergs? A. We did.

Q. Did his carryalls come equipped with those kind of tires? A. Yes, sir.

Q. In each instance? A. Yes, sir.

Q. Did Mr. Kuckenbergs's equipment—did you also sell him the tractors during 1942 and 1943?

A. We did in 1942.

Q. You did in 942? A. Yes.

Q. D8's? A. Yes, sir.

Q. Did they come equipped with any extra equipment, that you can recall?

A. Well, they would have miscellaneous guards on them, such as a crankcase guard, and perhaps a radiator guard and engine guards, but no attachments that would operate a bulldozer or a scraper.

Q. Approximately how much money would run into such guards as you have mentioned? How much would they cost?

A. I think the eighty-one hundred dollar price that I gave you on a D8 tractor would include the guards.

Q. Would include the guards? [158]

A. Yes.

Q. Those are also your 1942 prices that you have been giving us here? A. Yes, sir.

Q. When you say that the average life of a

(Testimony of E. E. Byrne.)

tractor approximates 4,000 hours, Mr. Byrnes, what do you mean by average life? What kind of usage would that include?

A. We mean normal usage.

Q. Normal usage? A. Yes.

Q. What do you mean by normal usage?

A. We mean tractors operating under soil conditions that do not contain sand or other abrasive materials.

Q. You said excluding the use of any sand?

A. Yes, sir; and other abrasive material.

Q. Is this equipment that we have been talking about here, is it designed to be used in circular manner when doing its operative work, carryalls and tractors?

A. If the tractor is pulling a large carryall it is not built to load a machine while it is turning.

Q. It is not built to load the machine while it is turning? A. No.

Q. Are tractors built to operate in a circular manner? A. Yes, sir.

Q. Without going beyond the ordinary usage?

[159]

A. Yes, sir.

Q. Likewise that may be stated to be true of carryalls when used in carrying and doing other work than loading?

A. Of course you could not use them unless you were able to turn.

Q. Then the fact they are loaded and used in

(Testimony of E. E. Byrne.)

a circular fashion, or in carrying their load, has absolutely no effect as far as wear and tear are concerned?

A. Will you repeat the question, please.

Q. The fact they are loaded and used in a circular fashion to turn and go about different directions, would not be beyond the normal usage?

A. Not after they are loaded.

Q. Not after they are loaded, but during the period that they are being loaded it would have?

A. Yes, sir.

Q. In normal usage of the carryall approximately what footage of operation is required to load the equipment?

A. It depends on the size of the carryall and whether using a pusher or tractor to help load it.

Q. Will you describe the operations there?

A. A large scraper, such as we are talking about? That is, the Model W LeTourneau?

Q. Yes.

A. Requires a tractor to pull it, requires another D8 tractor [160] to push it when loading.

Q. When loading? A. Yes.

Q. About how long, or over what space of travel is required to get a load on under those conditions?

A. That varies according to the material. It will probably run 75 to 125 feet, or 150 feet.

Q. 75 to 150, or 125 feet, did you say?

A. It will vary from 75 to 150 feet.

Q. Assuming that the carryall is being operated for two tractors, it is loaded in a circular fashion

(Testimony of E. E. Byrne.)

and then operated in ordinary manner after being loaded for a distance of—for a distance ranging anywhere from 1500 to 2000 feet, what effect would that have on the average life of the particular tracks of the cat on the D8?

A. Will you repeat that question, please?

Q. Assuming the situation where a carryall is being operated with two tractors, one to pull and one to push, and assuming that that equipment is being operated in a circular fashion in ordinary soil conditions but the only exception to its use being that it is operated in a circular fashion around a circle having a diameter of some 200 feet, and then the loaded equipment being used under ordinary circumstances to haul the material away, ranging from 1500 to 2000 feet, what variance would there be in the average life of tracks on the [161] "Cat-erpillar" that you mentioned as approximating 4,000 operating hours in the normal wear and tear?

A. I don't know the difference in percentage of wear and tear. D8 tractors normally would not have power enough to load a W scraper in that kind of a turn.

Q. Ordinarily it would not be able to operate?

A. It would not be able to load the scraper to capacity. It would not have power enough.

Q. Would they be able to load it to any capacity?

A. Oh, yes.

Q. Well, they would be able to operate then on a limited basis?

A. That is right.

(Testimony of E. E. Byrne.)

Q. Assuming they could operate on that limited basis, that is, by taking a less load, what effect would that have, if any, on the average life of the tracks?

A. It would have a serious effect, because they are not built to work that way. Tractors are not built——

Q. Can you approximate to any degree what the effect might be?

A. I don't know what it would be in percentage. It would certainly cut the life down, because the tractors are not built to load a scraper on a turn.

Q. Would operating in that manner also have a substantial effect on the carryall equipment? [162]

A. It would have an effect on the whole outfit, all of the equipment.

Q. But you are not able to state what the extent of that would be?

A. No, I am not, because it would cause excessive wear on the tires and perhaps some breakage there on the tongue of the scraper or on the pusher block behind the scraper.

Q. In the damage or excessive wear that it might cause.

A. Not that I know of.

Q. Would it cause any excessive wear on the tracks, on the track assembly of the "Caterpillars"?

A. It would naturally cause excessive wear on the trucks, track, rollers and the complete assemblies.

(Testimony of E. E. Byrne.)

Q. Could you say or approximate how much?

A. No, I couldn't.

Mr. Wanger: That is all.

Redirect Examination

By Mr. Gentner:

Q. Mr. Byrne, you gave the cost of bulldozer at the factory. What is the cost of the bulldozer installed here at Portland?

A. It would be approximately \$1200.

Q. \$1200. And the four-drum power unit was also a factory price. What is the installed price here at Portland?

A. Approximately \$1350.00.

Q. Now in loading in a circular manner on very hardpan, cement- [163] like ground with one tractor pulling and one tractor pushing, would there be any racking of the frame of the carryall?

A. There would be because the pusher tractor would not be pushing straight on the rear of the carryall. It would be pushing the carryalls sideways on the turn.

Q. Are these carryalls built for a side push in loading?

A. They are not.

Q. Now these carryalls have a blade for loading, do they not?

A. We call it the cutting edge.

Q. The cutting edge. And is that cutting edge designed to load large boulders and hardpan ground without the use of a rooter.

A. It is not.

(Testimony of E. E. Byrne.)

Q. What is this carryall designed for—to carry what type of——

A. It is not for carrying dirt and material that could be rooted up with a rooter so that the carryall can pick it up.

Q. Now if the tractor could be traveling in sandy mud and slush during the process of taking the load from the place where it is obtained to where it is dumped, and this mud and slush would be of a level sufficient to be up to the top of the tracks, what would be the effect of that on the track assembly? [164]

A. Well, there would be a large amount of excessive wear in the complete track assembly, also in the final drives of the machine.

Q. And how would that affect the final drives?

A. That type of material will eventually cut out the oils in the final drives, allow the oil to run out and of course the dirt to go in.

Q. That would destroy and ruin the final drive, would it? A. Yes, very easily.

Q. Approximately how much do the parts cost for track assembly on the D8—just the parts, not the labor? A. You mean the part complete?

Q. Yes; the track roll assembly.

A. Approximately \$1750.

Q. That is just for the parts? A. Yes.

Q. Would you know about what a final drive would cost, the entire assembly necessary?

(Testimony of E. E. Byrne.)

A. Approximately \$350, I believe, is the cost of a complete final drive.

Q. The labor of installing these tracks and final drives, as I understand it, is quite expensive, is it not? A. Yes.

Q. You don't have any figures on that, how-

Q. You don't have any figures on that, however, I assume?

A. Well, for installing that part of it it would probably [165] take 250 man hours.

Q. 250 man hours? A. Yes.

Q. Is that in the shop, or would that be out in the field? A. That is in the shop.

Q. And out in the field where the shop facilities are not available would that amount be increased?

A. Well, all labor or repairs made on a tractor on the job are much higher than they are in the shop.

Q. In other words, there is a difficulty, is there, that doesn't exist under shop conditions?

A. That is right.

Q. So that you would say that that amount would be increased considerably in the field?

A. Yes.

Mr. Gentner: That is all.

Mr. Wagner: That is all.

(Witness excused.)

Mr. Gentner: Mr. Cooley.

H. E. COOLEY

was thereupon produced as a witness in behalf of the defendants, and, having been first duly sworn, testified as follows: [166]

Direct Examination

By Mr. Gentner:

Q. Your name is H. E. Cooley?

A. That is right.

Q. And where do you reside, Mr. Cooley?

A. Seattle.

Q. By whom are you employed?

A. A. C. Goerig.

Q. During 1942 and 1943 by whom were you employed? A. A. C. Goerig.

Q. At what place on the job?

A. Kitsap County Airport, about 110 miles from Seattle.

Q. That was up at the same place the Kuckenberg equipment was being used?

A. That is right.

Q. What was your position on the job there?

A. I was foreman and took care of the equipment. I was overseer of the whole job.

Q. Now A. C. Goerig is a brother of A. J. Goerig, is he not? A. That is right.

Q. The gentleman who leased the Kuckenberg equipment? A. That is right.

Q. This job that you were on, as I understand it, was immediately next to the A. J. Goerig job?

A. Well, our job—we had the first there. There were two [167] jobs there and we had the first one,

(Testimony of H. E. Cooley.)

and it was a runway extension, and grading slopes, cutting slopes down, changing them. They were four-to-one and we changed them to seven-to-one slopes and all along the runway.

Q. Did you build any reventments?

A. No, we didn't have any revetments. We took out some that had already been built, is all.

Q. You were right on the same airport, right next to the A. J. Goerig job, weren't you?

A. Their job and our job ran together.

Q. Ran right together?

A. Ran practically the same. Well, the same material, except ours was a little bit different job, was all.

Q. Were you familiar with the conditions on the A. J. Goerig job?

A. Oh, yes. They were the same as ours.

Q. You were there during the time the Kuckenberg equipment was up there?

A. Oh, yes. We were there from the time they came. We were still there when they left.

Q. You were there before they came and after they left, as I understand it?

A. That is right.

Q. Now you saw these revetments being constructed by A. J. Goerig, did you not? [168]

A. Yes. I was there all the time.

Q. Now as I understand it, those started in about 200 feet in diameter, 100-foot radius, and worked down to about a 50-foot radius, did they?

A. Oh, about that on top. Then they were down

(Testimony of H. E. Cooley.)

to about 50 or 70 feet wide, I imagine. It has been quite a while, but, as I remember it, they were about that at the bottom.

Q. What were the weather conditions there in December and January and February on the job?

A. Well, we had quite a bit of rain and we had a little snow there that winter. In fact, we had about two feet of snow on the level there for a little while. It didn't last very long. And it made it quite a bit different when it did last.

Q. Did you see the Kuckenberg equipment when it came on the job there? A. Oh, yes.

Q. Was it in good condition?

A. Just like new, it looked to me, when it came in.

Q. Now what was the nature of the material that this equipment was about to work in?

A. Well, there is quite a bit of that kind of material. It is kind of a sand and gravel; kind of a cement gravel. What we call it up there is hardpan. But when it is dry, why, it is as good a material as there is to move, but when it gets [169] wet it kind of, oh, mushes all up like mush, and it is pretty hard to handle it when it is wet.

Q. You say it is sort of like cement when it is wet?

A. Well, it is just about like ready-mixed concrete when it is wet. You can lay it out in the sunshine and drain the water out and it seems to be all right.

(Testimony of H. E. Cooley.)

Q. Did you have any sunshine there in January, February and March?

A. Not much sunshine there then.

Q. Now this hardpan, what effect did that have on equipment, such as the scraper? What effect would that have?

A. Well, the scraper part of it, of course they are on rubber tires and it is hard on the digging bits. It wears them out pretty fast.

Q. On the bits?

A. But so far as the tires and the rest of them——

Q. Now you folks had—your company had put your tractors and carryalls up there, did it not?

A. We had some in.

Q. And did you use those?

A. Well, we did when it was dry, but we had shovels and trucks. We used a shovel and truck there, too, at the same time, but of course when the bad weather started we had to shut down the carryalls.

Q. You shut down the carryalls and tractors when the wet [170] weather came?

A. Yes. The only tractors we used were just the one necessary to keep the trucks busy.

Q. Why didn't you use your tractors and carryalls when the wet weather came?

A. Well, that was too expensive, for one thing, and then they didn't——

Q. What do you mean, too expensive? You mean it was bad on the equipment?

(Testimony of H. E. Cooley.)

A. Well, it was bad on the equipment, and then they wouldn't work, you see. All they did was just made a big mud pile and you could not do anything with it then.

Q. Now in your opinion—let me ask you, first, how long have you been in the construction business, Mr. Cooley? A. Oh, twenty years.

Q. Twenty years. In your opinion was it good construction practice to use tractors and carryalls in the construction of the revetments on the A. J. Goerig job during——

Mr. Wagner: I object, your Honor.

Mr. Gentner: Just a minute.

Q. ——during the period that they were up there, December, January, February, March and April?

Mr. Wagner: I wish to object to that. That is not within the issues of this case at all.

The Court: He may answer, subject to the objection. Go [171] head.

A. No. That wasn't a tractor job; that was a shovel job. In fact, we did that same job and figured on using a truck and shovel on that. It was an ideal shovel and truck job, was what it was.

Q. It was a job for shovel and truck?

A. That is what it was.

Q. But not for a tractor and scraper?

A. It was an ideal truck job for the weather conditions, and so on, although it wasn't a fine tractor job even for the summertime. The area wasn't big enough to operate that big equipment.

(Testimony of H. E. Cooley.)

Q. Did you see the loading proceeding in a circular manner in these revetments?

A. Oh, yes. We were very much interested in watching that, as a matter of fact, to see how it worked.

Q. In your opinion did that circular loading cause unusual wear and tear of the equipment?

A. Oh, yes. That loading—well, you have the line—you only have about half the lines to fill in your truck. Loading around curves anyway you have to throw one truck out, and you do that and it throws all the power of the motor on one side.

Q. And wears that one side?

A. And wears that one side. And they don't load very good, [172] either.

Q. They are built for straight loading ahead, are they not?

A. That is where they are most efficient. That is right.

Mr. Gentner: I think that is all.

Cross Examination

By Mr. Wagner:

Q. You indicated that when this soil up there or this material that was being moved was dry it was easy to move; is that right?

A. No, it is not easy to move. It is bad. That hardpan is hard stuff. I guess it is all right if you have a rooter and good enough power on the rooter to root it up, then it is not too bad, but—

Q. Did you see the rooter in operation up there?

(Testimony of H. E. Cooley.)

A. Well, some of the time I noticed they had a rooter but of course they had a little trouble with keeping the teeth.

Q. A little trouble with keeping the teeth?

A. Well, the teeth would not last very long. Then of course they would run out of teeth and they would try to work the rooter.

Q. Is that actually what happened?

A. Well, I would not say, but I know we had that same trouble. We had practically the same kind of work and sometime your teeth only would last about an hour and of course if the mechanics are not right handy they will keep on working and——

[173]

Q. This material indicated it was hard on the digging business but didn't affect the tires; is that right?

A. Well, not in working. It doesn't affect the tires, so far as the harpan is concerned, but of course in loading the way they load them——

Q. The soil conditions are very much the same all over the entire working—all over the entire airport up there?

A. Oh, no. They had some pretty fair dirt up at the other end. They had some hard and they had some that wasn't too hard.

Q. Some revetments up there, too?

A. They had some, a few up there on that end of the field, too.

(Testimony of H. E. Cooley.)

Q. Do you recall how many revetments were on the entire job? A. All told?

Q. Yes.

A. Well, let's see. There were about six or seven I think on that side of the taxi way 6, and then on the other end I imagine about five, four or five. I could not say offhand.

Q. Four or five on the other end, and, on the other end you referred to the same part of the airport that you said was pretty good working?

A. Well, some of it was pretty good, but then some of it was hard up there, too. But practically all your airport was similar—that same material.

[174]

Q. About how far did this equipment of Mr. Kuckenberg's have to travel to dispose of this material?

A. Well, let's see. Oh, I think they ran between a thousand and two thousand or twenty-five hundred feet, I think, they hauled some of that stuff.

Q. That was from the other end?

A. Well, they crossed the runway. They built—they put some dirt on the runway and put plank on it and then crossed the runway over to the west area. They came out of these revetments, come up and across and over into the west area there. Then some of it they took off behind, back in the lower part of the work—anywhere to get rid of it. That was the main thing.

Q. Some of it went up about 2500 feet there?

(Testimony of H. E. Cooley.)

A. I would say some of it was hauled as much as 2500 feet. When they would get it up in one place they would try to work someplace to keep working and try to get just the same drainage here and fix it up again.

Q. Can you describe what the size of the average gravel was that was included in this so-called hardpan? A. The size of the gravel?

Q. Yes. Can you describe that?

A. Well, it would run—well, that harpan runs anyway from nothing to an inch, inch and a half, 2-inch stuff. Then sometimes you would get some boulders in it. They had some few [175] big boulders to handle. In fact, we had some in our work right next to them where we had to shoot them. We could not get anything to pick them up with. We had to shoot them.

Q. Would you say most of that was average size gravel?

A. Well, I would say that was hardpan. It runs up from nothing, up to two or three-inch stuff.

Q. Well, generally speaking was it gravel or would you say it was sand, or was it part gravel and part sand?

A. Well, to us fellows it is just hardpan. I don't know just what you would call it.

Q. Is there any sand in it at all, or was it mud?

A. Well, it is sand and gravel, and kind of like cement gravel. Of course, cement gravel does not get as hard in the bank. I have had a little experience with cement gravel. It doesn't get that hard in

(Testimony of H. E. Cooley.)

the bank, but when the water touches it it just seems to mush all up. Then when the water gets out of it again it will tighten back up again.

Q. This gravel is not actually rock?

A. Well, no, I wouldn't call it rock.

Q. It is kind of hard mud, isn't it?

A. Well, no. It is rock. It is kind of—it is gravel all right, sand and gravel. A mixture is what it is, some kind of a glacial formation, I guess. I don't know what you would call it.

Q. Did Mr. Kuckenberg ever have any shovels up there on the [176] job, that you know of?

A. No, no shovel. I don't remember he had a shovel. All he had was cats and scrapers, if I remember right. Oh, he had some service trucks, and shop cars, and stuff like that.

Q. But to your knowledge he didn't have any shovels on the job up there at all?

A. No shovels.

Q. No shovels and trucks?

A. No. In fact, we finished their job with our trucks. We let them have them after we got through with them, and they finished with trucks and shovels.

Mr. Wagner: That is all.

Redirect Examination

By Mr. Gentner:

Q. These revetments you mentioned at the further end of the field that you said were easier soil, were they part of this A. J. Goerig job?

(Testimony of H. E. Cooley.)

A. Yes. You see, they had taxi ways and revetments, and our job——

Q. All of the revetments?

A. They took all of the revetments and taxi ways, and our job was runways and slope excavation to allow for the slopes.

Q. How many revetments did A. J. Goerig have?

A. Well, I would say they must have had ten or eleven.

Q. Ten or eleven? [177]

A. Yes, that is all.

Q. They didn't do all of them with this Kuckenberg equipment, did they?

A. No. Kuckenberg's rigs I think all worked in that one bunch there.

Q. Where there was hard soil?

A. Yes, all through that one.

Q. All right.

A. In fact, I am sure they did. I never saw any of them up at the other end.

Mr. Gentner: All right. Thanks very much.

(Witness excused.)

LEE H. GORDON

was thereupon produced as a witness in behalf of the defendants and, having been first duly sworn, testified as follows:

(Testimony of Lee H. Gordon.)

By Mr. Gentner:

Q. Your name is Lee Gordon? A. Right.

Q. And your residence is Portland?

A. Milwaukie; yes.

Q. Milwaukie, Oregon. You are not employed by Kuckenberg Construction Company at the present time, are you? A. No, I am not. [178]

Q. You are in business for yourself, as I understand it? A. That is right.

Q. Now in the year 1942 and '43 you were employed by Kuckenberg Construction Company, were you? A. That is right.

Q. In what capacity? A. Superintendent.

Q. And how many years experience have you had in construction work, Mr. Gordon?

A. Oh, about fifteen.

Q. And how many years had you been with Kuckenberg? A. I think four.

Q. And who else had you worked for before that time? A. Tavares Construction Company.

Q. That was heavy construction, was it?

A. Heavy construction.

Q. Who else?

A. Raymond Concrete Pile Company; Quinton Construction Company.

Q. In what capacity were you with them?

A. Superintendent for Tavares Construction Company; engineer for Raymond Pile.

Q. And who else did you work for?

A. Quinten Construction Company.

(Testimony of Lee H. Gordon.)

Q. Now did you go up on this Goerig job when the equipment was sent up there? [179]

A. No. I went up shortly after it was sent up.

Q. About how long afterwards?

A. Oh, when they first started having trouble, about two weeks.

Q. And what condition did you find there, Mr. Gordon?

A. Oh, I found that it is the same condition that has been described before here. It is just a cement gravel that was not being left, or not being loosened so that the cats and carryalls could operate with any degree of efficiency.

Q. At that time there was no rooter up there, as I understand it?

A. There was no ripper there at all, no.

Q. And this ground, you say, this soil condition, you say, has been described by Mr. Cooley?

A. That is right.

Q. That is the way you found it?

A. That is right.

Q. And in addition to that what were the conditions as to water?

A. Well, the ground, before it is loosened, is very hard. It is a hardpan.

Q. I mean, was there much water? Were there any springs on this job?

A. Oh, yes. All of their cuts seem to have springs in them and the water would run down through the cuts and no attempt [180] was made whatsoever to take care of draining on their cuts.

Q. Then what became of this water?

(Testimony of Lee H. Gordon.)

A. Well, it would run right down their haul roads, and it would mix up with the sand and the gravel that would spill from the scrapers and be just left a slush there all the way from six inches to a foot or a foot and a half deep and the cats were wallowing through it at all times.

Q. Now could that have been controlled?

A. Yes, it could. We controlled it there at our expense part of the time.

Q. How high—would this get up as far as the tops of the rollers on the cats?

A. Yes, it did, and over the top of the rollers.

Q. And even over the top?

A. Yes, it did.

Q. What effect did that have on the cats?

A. Well, that material was just an abrasive, was just what it amounted to—just like cement and sand mixed together—a very abrasive material.

Q. Wore them right down, eh?

A. Just wore them out completely.

Q. Did it affect their final drives?

A. Yes, it did. It would go through their seals and the sand would get into the oil and take the bearing and the gears out of them. [181]

Q. Well now, what was this doing to the—let me ask you again, before I get on to that, what was the condition of this equipment when it went up there?

A. It was all in good condition. I would say by that——

Q. Some of it new, was it?

(Testimony of Lee H. Gordon.)

A. Well, there was one cat and one carryall that was practically new. I don't believe it was run but very little at Spokane, and all the rest of it——

Q. All of the rest of it was in good shape?

A. Was good.

Q. What operation was being used by Goerig? Was he loading in a circle, or what?

A. Well, he was loading in a circle.

Q. And what effect was this having on the equipment?

A. Well, it jackknifes the scraper. That was between the two cats, one pulling and one pushing on it, and it has a jackknife effect on it, and the push cut behind in loading on that circle is pushing right into one of the tires, as a rule.

Q. And what did that do to the tire?

A. It blows the tires—cuts them up and blows them out, for one thing.

Q. What did it do on the carryalls? What effect did it have on the cables?

A. Well, I know it broke one arch up there, and the arch pin [182] is about nine inches in diameter, steel, and this is the first time I have ever seen one of those pins broken and it broke one of those pins up there, and broke the drawbars out of the cats and wrecked the scrapers.

Q. And did it do anything to the frames of the tractors?

A. Oh, the track frames themselves, pushing on the side just—well, they can't last very long that way. They just—it just tears them to pieces.

(Testimony of Lee H. Gordon.)

Q. Were any cables cut?

A. Well, loading without a ripper was harder on the cables than the actual loading in a circle.

Q. What did you do? What effect was this having on the equipment? I will ask you that.

A. Well, we had, when we got up there there was a couple of cats broken down and some of the scrapers were out of use, and we hired all the men we could get around there, our spare cat skimmers and our mechanics were there, and tried to get it back in shape.

Q. How many men did you have at work there?

A. Oh, we had two grease men and two cat skimmers, and myself, were working on the cats there, right away there. There were five of us.

Q. How many mechanics?

A. And one mechanic. That was it.

Q. Did you get any mechanics from Portland?

[183]

A. Yes, we did. We brought up three from Portland.

Q. Under ordinary conditions what kind of a crew would you need to keep that equipment in shape?

A. One mechanic working eight hours a day should be ample to keep that in condition and shape, and in good shape.

Q. And what did you do then?

A. Well, we tried to keep it going there. We took the whole fleet one afternoon and built haul roads under Kuckenberg's expense and cleaned up

(Testimony of Lee H. Gordon.)

this slush or slop, as we called it there, on the roads and cleaned them up so they could operate without breaking up the equipment, and then we started them up again the following morning.

Q. What did you finally do? Did you shut this job down?

A. I finally had to shut it down.

Q. And that was January 4th, was it?

A. I think it was January 4th.

Q. And why did you shut it down?

A. Well, we shut it down because we could not keep the equipment up. Even with this gang of mechanics and everybody we could have work on the equipment we couldn't keep it in shape, and as fast as we would send it out they would break it up and they insisted on loading in that circle and we would go out and make our complaints to their supervision out there and they would load in a straight line for a while, perhaps for an hour or two until our backs were turned, and [184] then they would be loading in a circle again, and no ripper, and we just couldn't operate. We couldn't keep the equipment in shape to keep going.

Q. Now if they had loaded they could have loaded in a straight line, could they not?

A. Yes, they could have.

Q. They could have used a ripper?

A. That is right.

Q. That would have eliminated a great portion of this unusual wear?

A. Well, it would have eliminated some of it,

(Testimony of Lee H. Gordon.)

yes, but the ground was so hard they still would have had trouble.

Q. It still was unsuitable? A. Yes.

Q. Would you say this was a job that was suitable for carryall operation?

A. Absolutely not.

Q. It would require shovels and trucks, would it? A. Uh huh. That is right.

Q. After the job started up again later on, you from time to time supervised it, did you, throughout the completion of the job? Is that it?

A. That is right.

Mr. Gentner: That is all.

Mr. Wagner: No cross examination.

(Witness excused.)

[185]

GORDON GIEBISCH

was thereupon produced as a witness in behalf of the defendants and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Gentner:

Q. Your name is Gordon Giebisch?

A. That is right.

Q. And you reside in Portland?

A. Yes, sir.

Q. How long have you been in construction work?

A. Oh, pretty near since I was a baby, twenty or thirty years.

(Testimony of Gordon Giebisch.)

Q. And you were on this Goerig Job up near Bremerton, were you not?

A. That is right.

Q. You went up there I believe in about the 10th of January, did you?

A. Right about in there, yes.

Q. And you acted in what capacity? As foreman the rest of the time?

A. Yes, that is right.

Q. For Kuckenberg? A. Yes, sir.

Q. And what were you supposed to do up there?

A. I was there to watch the equipment and keep it in repair, see that it was fixed and see that it was operated to as much [186] advantage as possible to Kuckenberg.

Q. Now did Goerig cooperate with you in trying to eliminate excessive or unusual wear and tear of this equipment? A. Well, not very well.

Q. Well, what do you mean by that?

A. Well, it was the matter of rooting up that hard ground in order to make things easier for the cats that should have been done, but as it required an extra equipment for them they didn't seem to want to do that.

Q. So they refused to use a rooter?

A. Well, they did until toward the latter part of the job. Finally we got them so they would use one a little bit, but before that it was just like pulling teeth to ever get them to put one in there.

Q. And did they use it properly and sufficiently after they did get one?

(Testimony of Gordon Giebisch.)

A. Well, not altogether, no, because they were shy of parts when the rooter teeth wore out very quickly and they didn't have enough supply for the teeth to keep it rooted even then as it should have been.

Q. What was the condition of the water there on the haul way and the mud where you were hauling from the revetment out to the dumping place?

A. The condition of the water?

Q. The mud and slush? [187]

A. The water was allowed to run out of these revetments down into the haul road where the cats had to go through this all the time and the material was—it consisted of the gravel and sand that was mixed up with the water most of the time, which made an abrasive agent there just like a sandpaper, and the cats, the tracks were in that and were covered with it most of the time that we were running in there.

Q. It was deep enough so that it covered the entire tracks, did it?

A. That is right. In one place where we were loading there out of one pit the muck there was up to the top of those tracks.

Q. Now did you attempt to get Goarig to load in a straight line there? A. Yes, I did.

Q. And did he do it?

A. He did it a little bit while I was there, but when I come back, why, he was loading around again in a circle.

(Testimony of Gordon Giebisch.)

Q. It was possible to load in a straight line, was it not? A. Yes, it could have been done.

Q. Were there any boulders on this or in this ground?

A. Yes, there were. And in loading around the circle and striking those boulders was the thing that caused a lot of the trouble with those cats, and under normal operation with loading with a cat and carryall the cat and carryall is [188] supposed to be going in a straight line and ordinarily when the push cat comes up behind the cat and carryall for loading they go along in a fairly smooth sort of a way until that carryall is loaded and goes to get away from there, and the moment you start loading around that circle you lose the power in your cats and the first thing that happens is your operators, they get to fighting with both cats, both your pushing cat and your pulling cat; that is, fight clutches, and so forth, and they are trying to load around in a circle, using these levers and things, and that is all the stuff that wrecks the cats and carryall both.

Q. In other words, dragging back and forth?

A. Dragging, and just finally fighting that way with the cats to try to get a load in it.

Q. What about these boulders? Was this carryall proper equipment to get for this?

A. No; none—not unless it is rooted out; at least a bulldozer to bulldoze them out or a rooter to kick that out, one or the other, which they could be picked up in less time.

(Testimony of Gordon Giebisch.)

Q. When that wasn't done what was the effect on the equipment?

A. When I hit one of those boulders—now when you are going along in hardpan it stops everything. You have got your cats standing there. The first thing you know your bits are gone out of your carryall. It all causes breakage.

Q. Now was there much breakage of bits or blades on the [189] carryalls?

A. Yes, there was.

Q. What effect did all of this operation have on the equipment?

A. What do you mean, what effect?

Q. Well, what did it do to the equipment?

A. It wrecked it.

Q. Was this in your opinion a proper job for carryalls and cats loading?

A. I would say not, no.

Mr. Gentner: You may examine.

Cross Examination

By Mr. Wagner:

Q. What do you mean, Mr. Giebisch, when you say that it was possible to load in a straight line but that Goerig refused to do it? Will you explain that a little bit for us.

A. Well, by loading in a straight line they would have had to have the planer go in there with the bulldozer to cut the curve out and throw that dirt out so the cats would pick it up and as they laid it there across the dam. That was extra work

(Testimony of Gordon Giebisch.)

for them naturally because it took an extra task to get that, and there we brought it from the curve out to where it could be loaded in a straight line.

Q. But it could have been done very easily?

A. It could have been done.

Q. And what did you say your job was up there? [190]

A. My job was taking care of the cats and carryalls to see that the repairs were made and to keep the cat operators, and so forth. We furnished operators.

Q. You say you were foreman?

A. For Kuckenberg, yes. In other words, I didn't have any say over other operations.

Q. You didn't have any say over the operations of the company at all?

A. Not the actual doing of the work, outside of arguing with them about it.

Q. In your opinion it is a fact that there could have been straight line loading? A. Yes.

Q. And in your opinion would that have caused any extraordinary wear or breakage on the machinery?

A. Well, I think that the material itself would have, anyway; yes.

Q. The material itself would?

A. The hardpan—in other words, they are not made for loading of hardpan, unless it is rooted up and softened up in some way beforehand, on any cat and carryall operation.

(Testimony of Gordon Giebisch.)

Mr. Wagner: That is all.

Mr. Gentner: That is all.

(Witness excused.)

[191]

CHARLES H. MILLER

was thereupon produced as a witness in behalf of the defendants and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Gentner:

Q. Your name is Charles H. Miller?

A. Yes, sir.

Q. And your office is in the Wilcox Building, is it?

A. 801 Wilcox Building.

Q. You were for some time connected with the OPA, were you not?

A. For sixteen months.

Q. Just speak a little louder. And could you kindly tell the Court in what capacities you were employed by the OPA?

A. Well, as I started in in the Investigation Section as Chief Inspector, transferred over to the Price Division when the Investigation Section arrangement was changed, and became Price Specialist, and eventually the Chief of the Industrial Materials and Equipment Section. That means that our job was to explain the regulations concerning machinery and machine tools, iron and steel and all types of the heavy industrial equipment to anyone

(Testimony of Charles H. Miller.)

inquiring in that field. We would give them the regulation, help them understand the clauses therein, or give them any of the interpretations that came out either from the National or the Regional Office; [192] in other words, a Price Administrator job.

Q. During what period of time were you there? What was the last title you had there?

A. Chief of the Industrial Materials and Equipment Section.

Q. What period of time did you occupy that position?

A. From about January, 1943, to August 31st.

Q. 1943? A. Yes.

Q. At that time you resigned, did you?

A. Yes, sir; in August.

Q. Now Mr. Miller, with reference to—could you give him this Pre-Trial Exhibit 21.

(Pre-Trial Exhibit 21 was passed to the witness by the Clerk.)

Q. Before I ask you this question, Mr. Miller, was it a part of your duties to figure rates under Regulation 134?

A. My chief work was figuring the schedules under 134 and 136, and to assist those who wanted help, came in for help or asked for help to figure out their rentals under these regulations, yes.

Q. And you are thoroughly familiar with the method of figuring rates and prices under Regulation 134, are you? A. I am.

Q. Did you make a computation—

(Testimony of Charles H. Miller.)

Mr. Wagner: Just a minute. If the Court please, I want [193] to ask counsel if the qualification is for the purpose of establishing Mr. Miller as an expert witness?

Mr. Gentner: Yes.

Mr. Wagner: Is that it? And an expert in what capacity?

A. An expert for computing rates and prices under Regulation 134.

Mr. Wagner: And Mr. Miller is being employed, is he, as an expert in this case?

Mr. Gentner: Yes, he is.

Mr. Wagner: Well, I wish to object generally, your Honor, and more specifically, to the introduction of any evidence and any testimony by Mr. Miller as not being relevant, competent or material; and, further, that the matter of the production of sheets and the matter of the figures involved in this case are not the subject of any—should not be the subject of any expert testimony. We have the figures and we have the Regulation, and that any interpretations that may be forthcoming are matters for the Court and not for an expert.

The Court: I will hear the witness.

Mr. Gentner: Q. Mr. Miller, you testified you are thoroughly familiar with the method of computing rates under 134? A. Yes, I am.

Q. Did you make a computation of the maximum prices under [194] Regulation 134, covering the Goerig operations, Goerig rentals by Kuckenberg Construction Company?

(Testimony of Charles H. Miller.)

A. Yes, I did.

Q. And what is the number of that exhibit you have?

A. The number of the exhibit is Exhibit 21.

Q. Referring to Exhibit 21, is that your computation?

A. This is my computation on the A. J. Goerig Construction Company rental with Kuckenberg—between Mr. Kuckenberg and A. J. Goerig Construction Company.

Q. What is that computation?

A. It is an application of a schedule of rates in Regulation 134, plus the part of operating and maintenance service rates by the Office of Price Administration to the possession time of the equipment account, operating time of the equipment of the employees that worked with the equipment, so that Mr. Kuckenberg could know what the maximum OPA price was, according to Regulation 134, at the time.

Q. Did you also make any computation of the Buckler and Lease & Leigland jobs?

A. I did.

Mr. Gentner: I might say, your Honor, at the time at pre-trial I didn't know that Mr. Wagner would confine himself to five pieces of equipment only on the Buckler, and the computation that was offered here covered all equipment that was rented to the Bucklers and not just the graders [195] that are the subject of this suit, and so I have had Mr.

(Testimony of Charles H. Miller.)

Miller prepare a new computation covering only the graders, which are the only pieces of equipment that the plaintiff is proceeding on—of course, which we didn't know until after this had been prepared; and so I would like permission to offer this. This is offered but objections are made to its introduction. I would like to withdraw the Buckler portion of it as all of the equipment and substitute a computation for only the graders, which is all that Mr. Wagner has put in, and if you would kindly, I guess, mark this. Have the Reporter mark this 22, and I will have Lease & Leigland marked. I think probably you could mark this 22-A and 22-B. They are both 22. This is the other portion on these. Or would the Court Reporter mark them both 22.

(Thereupon the statement dated November 13, 1944, Kuckenberg Construction Company, sold to George H. Buckler, Contractor, etc., was marked Defendants' Exhibit 22-A; and the statement of Kuckenberg Construction Co., sold to Lease & Leigland, Contractors & Builders, at Portland and Toledo, Oregon, so offered, was marked Defendants' Exhibit 22-B.)

(Testimony of Charles H. Miller.)

DEFENDANT'S EXHIBIT No. 22-A

KUCKENBERG CONSTRUCTION CO.

General Contractors

Portland, Oregon

Phone: TRinity 0407 11104 N. E. Holman St.

Date November 13, 1944

Sold To George H. Buckler, Contractor
 George H. Buckler Company
 The Buckler Corporation, Builders
 Portland, Oregon & Vancouver, Washington

Ship To	Your Number
Terms: Net Cash	Our Order

1943 Kuckenberg - Buckler Rental

SUMMARY STATEMENT OF RENTALS FOR
SIX MOTOR GRADER UNITS

#600, 601, 603, 604, 605, 606

Total Hours Worked by Graders.....	3,280½ hours
Total Billing by Kuckenberg Construction Co.	\$ 27,306.43
Total Ceiling Price Based on OPA Reg. 134 for Bare Rental and approved Operating & Maintenance Rates by OPA letter Feb. 5, 1943 (\$3.50 per hr.)....	\$ 27,218.20
Total Ceiling Price Based on Portland Competitors OPA Rates of Feb. & March 1943 (\$4.40 per hr.)..	\$ 30,170.65
Total Ceiling Price Based on OPA Letter of May 24, 1944 to Kuckenberg Construction Co. (\$3.55 and \$3.75 per hr.)	\$ 27,576.13

(Testimony of Charles H. Miller.)

Defendant's Exhibit No. 22-A—(Continued)

KUCKENBERG CONSTRUCTION Co.

General Contractors

11104 Northeast Holman Street

Portland, Oregon

MOTOR GRADER UNITS

K—#600 Austin Western—99M—Diesel—All Wheel Drive
& Steer—11 Ton—Serial DS-1872

K—#601 Austin Western—etc.—Serial DS-2662

K—#605 Austin Western—etc.—Serial DS-3386

K—#606 Austin Western—etc.—Serial DS-3396

OPA Equipment Rental Rate	Month	Week	Day
Grader, Self Propelled, Diesel Pneumatic Tired, All Wheel Drive & Steer	\$580.00	\$193.00	\$48.00
Scarifier, Heavy	35.00	12.00	3.00
Generator, Electric (Lights).....	15.00	5.00	1.50
Total Equipment Rental.....	\$630.00	\$210.00	\$52.50

OPA Approved Operating and Maintenance Service
Rate \$3.50 per hr.K—603 Caterpillar Diesel Road Patrol #12—
Serial 9K4154SP—Buckler #189K—604 Caterpillar Diesel Road Patrol #12—
Serial 9K4751SP—Buckler #174

OPA Equipment Rental Rate	Month	Week	Day
Grader, Self Propelled, Diesel Pneumatic Tired, Extra Heavy Duty....	\$525.00	\$173.00	\$42.00
Scarifier, Heavy	35.00	12.00	3.00
Generator, Electric (Lights).....	15.00	5.00	1.50
Total Equipment Rental.....	\$575.00	\$190.00	\$46.50

OPA Approved Operating and Maintenance Service
Rate \$3.50 per hr.

(Testimony of Charles H. Miller.)

Defendant's Exhibit No. 22-A—(Continued)

KUCKENBERG CONSTRUCTION Co.

General Contractors

11104 Northeast Holman Street

Portland, Oregon

1943 KUCKENBERG - BUCKLER RENTAL

Detail of Billing by OPA Maximums

K—#600 Motor Grader—Austin Western—99M—Diesel
All Wheel Drive and Steer—11 Ton—Serial DS-1872,
Buckler #173

OPA Equipment Rental,	Month	Week	Day
Regulation 134	\$630.00	\$210.00	\$52.50

OPA Approved Operating & Maintenance Service
Rate \$3.50 per hr. (2/5/43)

OPA Equipment Rental for March—9 days—9/30	
of \$630	\$ 189.00
29½ Hrs. O & M Charges @ \$3.50 per hr.....	103.25
3 Hrs. Operators Overtime and Insurance.....	2.88
OPA Equipment Rental for April 1943.....	630.00
114 Hrs. O & M Charges @ \$3.50 per hr.....	399.00
34 Hrs. Operators Overtime and Insurance.....	32.64
OPA Equipment Rental for May 1943.....	630.00
174½ Hrs. O & M Charges @ \$3.50 per hr.....	610.75
78½ Hrs. Operators Overtime and Insurance.....	75.36
OPA Equipment Rental for June 1943.....	630.00
160½ Hrs. O & M Charges @ \$3.50 per hr.....	561.75
48 Hrs. Operators Overtime and Insurance.....	46.08
6 Hrs. Operators Showup Time	11.17
OPA Equipment Rental for July 1943.....	630.00
222½ Hrs. O & M Charges @ \$3.50 per hr.....	778.75
70½ Hrs. Operators Overtime and Insurance.....	67.68
Cartage—Portland Area—2 Ways	31.00
Allocation for supervision—129 Days	584.37
Grader K—#600—Total OPA Maximum Rental.....	\$6,013.68

(Testimony of Charles H. Miller.)

Defendant's Exhibit No. 22-A—(Continued)

KUCKENBERG CONSTRUCTION Co.

General Contractors

11104 Northeast Holman Street

Portland, Oregon

1943 KUCKENBERG - BUCKLER RENTAL

Detail of Billing by OPA Maximums

K—#601 Motor Grader—Austin Western—99M—Diesel
All Wheel Drive and Steer—11 Ton—Serial DS-2662,
Buckler #101

OPA Equipment Rental,	Month	Week	Day
Regulation 134	\$630.00	\$210.00	\$52.50

OPA Approved Operating & Maintenance Service
Rate \$3.50 per hr. (2/5/43)

16 Hrs. Operators Overtime—Nov. 1942 @ 96c.....	\$ 15.36
OPA Equipment Rental for January 1943.....	630.00
201½ Hrs. O & M Charges @ \$3.50 per hr.....	705.25
87 Hrs. Operators Overtime and Insurance.....	83.52
OPA Equipment Rental for February 1943.....	630.00
236 Hrs. O & M Charges @ \$3.50.....	826.00
70 Hrs. Operators Overtime and Insurance.....	67.20
OPA Equipment Rental for March 1943.....	630.00
185½ Hrs. O & M Charges @ \$3.50 per hr.....	649.25
59 Hrs. Operators Overtime and Insurance.....	56.64
OPA Equipment Rental for April—3 Days	63.00
3/30 of 630—3 x \$21.00	
4½ Hrs. O & M Charges @ \$3.50 per hr.....	15.75
4½ Hrs. Operators Overtime and Insurance.....	4.32
Cartage—Vancouver Area—2 Ways	52.00
Allocation for supervision—93 Days	421.29
Grader K—#601—Total OPA Maximum Rental.....	\$4,849.58

(Testimony of Charles H. Miller.)

Defendant's Exhibit No. 22-A—(Continued)

KUCKENBERG CONSTRUCTION Co.

General Contractors

11104 Northeast Holman Street

Portland, Oregon

1943 KUCKENGER - BUCKLER RENTAL

Detail of Billing by OPA Maximums

K—#603 Motor Grader, Serial #9K4154-SP, Buckler
 #189—Caterpillar Diesel Road Patrol #12—With
 Scarifier and Lights or Generator

OPA Equipment Rental,	Month	Week	Day
Regulation 134	\$575.00	\$190.00	\$46.50

OPA Approved Operating & Maintenance Service
 Rate \$3.50 per hr.

OPA Equipment Rental—April—9 Days, 9/30 of \$575	
—\$19.166 x 9 days	\$ 172.49
74 Hrs. O & M Charges @ \$3.50 per hr.....	259.00
18 Hrs. Operators Overtime and Insurance.....	17.28

OPA Equipment Rental—May—240 hrs.	575.00
7 Hrs. Equipment Rental over 240 hrs. @ 1/480 of	
\$575—\$1.1979 x 7 hrs.	8.39
247 Hrs. O & M Charges @ \$3.50 per hr.....	864.50
62½ Hrs. Operators Overtime and Insurance.....	83.52

OPA Equipment Rental for June—22 Days—22/30 of	
\$575—\$19.166 x 22	421.65
138 Hrs. O & M Charges @ \$3.50 per hr.....	483.00
35 Hrs. Operators Overtime and Insurance.....	33.60
6 Hrs. Operators Showup Time and Insurance.....	11.17
Cartage—Portland Area—2 Ways	31.00
Allocation for supervision—61 Days	276.33

Grader K—#603—Total OPA Maximum Rental.....\$3,236.93

(Testimony of Charles H. Miller.)

Defendant's Exhibit No. 22-A—(Continued)

KUCKENBERG CONSTRUCTION Co.

General Contractors

11104 Northeast Holman Street

Portland, Oregon

1943 KUCKENBERG - BUCKLER RENTAL

Detail Billing by OPA Maximums

K—#604 Motor Grader, Serial #9K4751-SP, Buckler
 #174—Caterpillar Diesel Road Patrol #12—With
 Scarifier and Lights or Generator

OPA Equipment Rental,	Month	Week	Day
Regulation 134	\$575.00	\$190.00	\$46.50

OPA Approved Operating & Maintenance Service
 Rate \$3.50 per hr.

OPA Equipment Rental for January 1943.....	\$ 575.00
146½ Hrs. O & M Charges @ \$3.50 per hr.....	512.75
39½ Hrs. Operators Overtime and Insurance.....	37.92
OPA Equipment Rental for February 1943	575.00
134½ Hrs. O & M Charges @ \$3.50 per hr.....	470.75
26 Hrs. Operators Overtime and Insurance.....	24.96
OPA Equipment Rental for March 1943.....	575.00
69½ Hrs. O & M Charges @ \$3.50 per hr.....	243.25
29½ Hrs. Operators Overtime and Insurance.....	27.96
OPA Equipment Rental for April 1943—21 Days—	
21/30 of \$575—\$19.166 x 21 Days.....	402.49
160 Hrs. O & M Charges @ \$3.50 per hr.....	560.00
56 Hrs. Operators Overtime & Insurance.....	52.13
Cartage—Vancouver Area—2 Ways	52.00
Allocation for supervision—111 Days	502.83
Grader K—#604—Total OPA Maximum Rental.....	<u>\$4,612.04</u>

(Testimony of Charles H. Miller.)

Defendant's Exhibit No. 22-A—(Continued)

KUCKENBERG CONSTRUCTION Co.

General Contractors

11104 Northeast Holman Street

Portland, Oregon

1943 KUCKENBERG - BUCKLER RENTAL

Detail of Billing by OPA Maximums

K—#605 Motor Grader—Austin Western—99M—Diesel—
All Wheel Drive and Steer—11 Ton—Serial 3386,
Buckler #102

OPA Equipment Rental,	Month	Week	Day
Regulation 134	\$630.00	\$210.00	\$52.50

OPA Approved Operating & Maintenance Service

Rate \$3.50 per hr. (2/5/43)

18½ Hrs. Operators Overtime Nov. 11 & 26, Dec. 8 & 9, 1942 @ 96c	\$ 17.76
OPA Equipment Rental—Jan. 1 to 31, 1943.....	630.00
237½ Hrs. O & M Charges @ \$3.50 per hr.—January	831.25
87½ Hrs. Operators Overtime and Insurance—Jan.	84.00
OPA Equipment Rental—February—In possession of Lessee	630.00
OPA Equipment Rental—March 1 to 15, 1943—15/30 of \$630	315.00
92 Hrs. O & M Charges @ \$3.50 per hour—March....	322.00
23 Hrs. Operators Overtime and Insurance—March	22.08
Cartage—Vancouver Area—2 Ways.....	52.00
Allocation for supervision—75 Days	339.75
Grader K—#605—Total OPA Maximum Rental.....	\$3,243.84

(Testimony of Charles H. Miller.)

Defendant's Exhibit No. 22-A—(Continued)

KUCKENBERG CONSTRUCTION Co.

General Contractors

11104 Northeast Holman Street

Portland, Oregon

1943 KUCKENBERG - BUCKLER RENTAL

Detail of Billing by OPA Maximums

K—#606 Motor Grader—Austin Western—99M—Diesel—
All Wheel Drive and Steer—11 Ton—Serial 3396

OPA Equipment Rental,	Month	Week	Day
Regulation 134	\$630.00	\$210.00	\$52.50

OPA Approved Operating & Maintenance Service
Rate \$3.50 per hr. (2/5/43)

OPA Equipment Rental for February 1943.....	\$ 630.00
220¼ Hrs. O & M Charges @ \$3.50—February.....	770.88
70 Hrs. Operators Overtime and Insurance—Feb.....	67.20
OPA Equipment Rental for March 1943—240 Hrs.....	630.00
43¼ Hrs. Equipment Rental over 240 Hrs. @ 1/480 of 630, per Hr.—\$1.3125.....	56.77
283¼ Hrs. O & M Charges for March @ \$3.50.....	991.38
78½ Hrs. Operators Overtime and Insurance—March	75.36
OPA Equipment Rental for April 1943.....	630.00
107 Hrs. O & M Charges @ \$3.50 for April.....	374.50
36 Hrs. Operators Overtime and Insurance—April....	34.56
OPA Equipment Rental for May 1/2 Mo.—15/30 of \$630.00	315.00
42½ Hrs. O & M Charges @ \$3.50 for May.....	148.75
10½ Hrs. Operators Overtime and Insurance—May	10.08
Cartage—Vancouver Area—2 Ways	52.00
Allocation for supervision—105 Days.....	475.65
Grader K—#606—Total OPA Maximum Rental.....	\$5,262.13

(Testimony of Charles H. Miller.)

DEFENDANT'S EXHIBIT No. 22-B

Address All Mail: Route 7 - Box 949

KUCKENBERG CONSTRUCTION CO.

General Contractors

Portland, 16, Oregon

Phone WEBster 2259 11104 N. E. Holman St.

Date May to December 1943

Sold To Lease & Leigland, Contractors & Builders
At Portland and Toledo, Oregon

Ship To
Terms: Net Cash

Your Number
Our Order

SUMMARY COMPARISON

Of Actual Billing With OPA Maximum Rentals

Units Rented	Possession	Hours	As Billed	OPA Max.
#601 Motor Grader	5/1 to 11/2	815 Hrs.	\$ 5,420.91	\$ 5,601.66
#605 Motor Grader	10/5 to 10/13	8 Hrs.	67.20	451.20
10-Ton Roller, Gas, 3 Wheel	10/5 to 11/18	40 Hrs.	274.44	462.44
#99M Patrol Grader	10/14 to 12/22	190½ Hrs.	1,524.00	2,094.75
#410 Cat. & Carryall	10/16 to 11/9	42 Hrs.	487.20	1,851.55
#410 Cat. & Dozer	11/9 to 12/23	342 Hrs.	3,106.81	3,113.10
#415 Cat. & Dozer	10/26 to 11/9	13 Hrs.	118.17	835.90

Aggregate Totals.....	\$10,998.73	\$14,410.60
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Not In Excess of OPA Maximums

The aggregate rental billed and/or paid is \$3,411.87 less than the OPA Maximum billing. In some instances the lessee paid the wages of the operator, and other operating charges.

Comparisons of actual billing and OPA Maximum billing have taken this into account in each instance. Furthermore, each individual machine unit has been billed and/or paid at a figure less than the OPA Maximum.

To the best of our knowledge and belief the rentals charged to Lease and Leigland on these rentals are not in excess of the OPA permitted maximums, either individually by machines or in the aggregate.

(Testimony of Charles H. Miller.)

Defendant's Exhibit No. 22-B—(Continued)

KUCKENBERG CONSTRUCTION CO.

General Contractors

11104 Northeast Holman Street

Portland, Oregon

Lease & Leighland

N. W. 35th & Yeon St.

Portland, Oregon

CORRECTED SUMMARY†

Rental of #601† Motor Grader—Austin Western M-99 w/Heavy
Scarifier & Generator for Lights

As Billed

Inv. 6/10—(CB #35) May 1 to 31—

211½ Hrs. @ 6.40*\$1,353.60....

Inv. 7/23—(CB #42) June 1 to 30—

260 Hrs. @ \$6.40* 1,664.00

Inv. 8/20—(CB #47) July 1 to 31—

18½ Hrs. @ \$6.40*

Inv. 8/20—(CB #47) Aug. 1 to 5—

34 Hrs. @ \$6.40*

}	1,404.80
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Total to here..... 691 Hrs.....\$4,422.40

In Possession—Not Used—Aug. 5 to 31 }

Aug. 5 to Oct. 4

“ “ Sept 1 to 30 }

Two Months

“ “ Oct. 1 to 4 }

Possession

Inv. 11/4/43—Oct. 5 to Nov. 1—124 Hrs. @ \$8.00.....\$ 992.00

#601 Blade Returned

Inv. 11/4/43—Operators Time Moving Blade to K's

Warehouse 3½ Hrs. @ \$1.60 5.60

Insurance on Operators Overtime91

Grader #601 Total Actual Billing.....\$5,420.91

*(May 1 to Aug. 5—Operators Wages @ \$1.60 per hr. paid
by lessee.)

[Printer's Note] : †Underscored in red pencil.

(Testimony of Charles H. Miller.)

Defendant's Exhibit No. 22-B—(Continued)

Corrected Summary—(Continued)

#601 Motor Grader—AW-M-99 All Wheel Drive & Steer, with Heavy Scarifier & Generator for Lights

	Month	Week	Day
OPA Equipment Rental	\$630.00	\$210.00	\$52.50

OPA Approved O & M Rate—\$3.50 per hr.

Possession—May 1, 1943 to Nov. 2, 1943—6-2/30 Months

OPA Equipment Rental—6-2/30 Months @ \$630.00....\$3,822.00

20 Hrs. —June—In excess of 240 Hrs.—1/480 of 630—

1.3125 x 20 Hrs. 26.25

691 Hrs. O & M—May 1 to Aug. 5 @ \$3.50..... 2,418.50

124 Hrs. O & M—Oct. 5 to Nov. 1 @ \$3.50..... 434.00

31½ Hrs. Operators Time—Moving Blade to K's Warehouse & Insurance 6.51

Total.....\$6,707.26

Deduct—Operators Wages Paid by Lessee—May 1 to

Aug. 5—691 Hrs. @ \$1.60 1,105.60

Net OPA Maximum\$5,601.66

Compare with Actual Billing\$5,420.91

#605† Motor Grader AWM-99 w/Scarifier & Lights

Inv. 11/4/43 Oct. 5 to Oct. 13—8 Hrs. @ \$8.00.....\$ 64.00

Operators Time Moving Blade to K. Warehouse 2 Hrs..... 3.20

Total Actual Billing.....\$ 67.20

	Month	Week	Day
OPA Equipment Rental			
Motor Grader AW All Wheel Drive & Steer	\$630.00	\$210.00	\$52.50

O & M Approved Rate—\$3.50 per hr.

Possession—2 weeks

[Printer's Note] : †Underscored in red pencil.

(Testimony of Charles H. Miller.)

Defendant's Exhibit No. 22-B—(Continued)

Corrected Summary—(Continued)

OPA Equipment Rental—2 Weeks	\$420.00
8 Hrs. O & M Charges @ \$3.50.....	28.00
Moving Blade to K's Warehouse.....	3.20
	<hr/>
Total OPA Maximum.....	\$451.20
	<hr/>
Compare Actual Billing	\$ 67.20

Roller, Gas, Three Wheel, 10-Ton

As Billed

11/ 4/43—38 Hours Roller Operating Time—@ \$6.00....	\$228.00
37 Hours Operators Overtime @ 80c.....	29.60
Insurance on Operators Overtime	4.84
11/18/43—2 Hours Roller Rental @ \$6.00.....	12.00
	<hr/>
Total Actual Billing.....	\$274.44

	Month	Week	Day
OPA Equipment Rental	\$270.00	\$ 90.00	\$22.00
O & M Approved Rate @ \$3.50			

Possession—Oct. 5 to Nov. 18—1-14/30 Mo.

Equipment Rental—1-14/30 Mo. x 270.....	\$288.00
38 Hrs. O & M Charges @ \$3.50.....	133.00
37 Hrs. Operators Overtime	29.60
Insurance on Operators Overtime	4.84
2 Hrs. O & M Charges @ \$3.50	7.00
	<hr/>
Total OPA Maximum.....	\$462.44
	<hr/>
Compare with Actual Billing	\$274.44

(Testimony of Charles H. Miller.)

Defendant's Exhibit No. 22-B—(Continued)

[Kuckenberg Construction Co. Letterhead]

BREAKDOWN OF ACTUAL BILLING

Lease & Leigland, Toledo, Oreg.

Rental for October, November, December 1943

To Show Machine Operating Hours & Rental Billed by Units

Week Ending	Equipment	Mach. Hrs.	Amt. Inv.	99-M Patrol		410 Cat & Dozer		410 Cat & Carryall		415 Cat & Dozer	
				Hrs.	Amt.	Hrs.	Amt.	Hrs.	Amt.	Hrs.	Amt.
10/20/43	99-M Patrol	29½	\$236.00	29½	\$236.00	....	.....	....	.....	....	.....
	410 Cat & Carryall	12	139.20	....	.....	....	.....	12	\$139.20	....	.....
10/27/43	99-M Patrol	20	160.00	20	160.00	....	.....	....	.....	....	.....
	410 Cat & Carryall	30	348.00	....	.....	....	.....	30	348.00	....	.....
	415 Cat (& Dozer)	2	18.18	....	.....	....	.....	....	.....	2	18.18
11/ 3/43	99-M Patrol	14	112.00	14	112.00	....	.....	....	.....	....	.....
	410 Cat (& Dozer)	26½	240.89	....	.....	26½	240.89	....	.....	....	.....
	415 Cat (& Dozer)	11	99.99	....	.....	....	.....	....	.....	11	99.99
11/10/43	99-M Patrol	10	80.00	10	80.00	....	.....	....	.....	....	.....
	410 Cat (& Dozer)	72½	657.03	....	.....	72½	657.03	....	.....	....	.....
11/17/43	99-M Patrol	4½	36.00	4½	36.00	....	.....	....	.....	....	.....
	410 Cat (& Dozer)	45½	413.60	....	.....	45½	413.60	....	.....	....	.....
11/24/43	99-M Patrol	9	72.00	9	72.00	....	.....	....	.....	....	.....
	410 Cat (& Dozer)	42	381.78	....	.....	42	381.78	....	.....	....	.....
12/ 1/43	99-M Patrol	11	88.00	11	88.00	....	.....	....	.....	....	.....
	410 Cat (& Dozer)	45½	413.60	....	.....	45½	413.60	....	.....	....	.....
12/ 8/43	99-M Patrol	15	120.00	15	120.00	....	.....	....	.....	....	.....
	410 Cat (& Dozer)	25	227.25	....	.....	25	227.25	....	.....	....	.....
12/15/43	99-M Patrol	46	368.00	46	368.00	....	.....	....	.....	....	.....
	410 Cat (& Dozer)	59½	540.86	....	.....	59½	540.86	....	.....	....	.....
12/22/43	99-M Patrol	31½	252.00	31½	252.00	....	.....	....	.....	....	.....
	410 Cat (& Dozer)	25½	231.80	....	.....	25½	231.80	....	.....	....	.....
Total Hours		587½ Hrs.		190½ Hrs.		342 Hrs.		42 Hrs.		13 Hrs.	
Total Amounts			\$5,236.18		\$1,524.00		\$3,106.81		\$487.20		\$118.17

(Testimony of Charles H. Miller.)

Defendant's Exhibit No. 22-B—(Continued)

[Kuckenberg Construction Co. Letterhead]

#99-M PATROL GRADER

Motor Grader—Austin Western—99-M All Wheel Drive and Steer—11 Tons—With Heavy Scarifier and Generator for Lights.

	Month	Week	Day
OPA Rental Rate	\$630.00	\$210.00	\$52.50
OPA Approved Operating & Maintenance Rate @ \$3.50 per hr.			
Possession: From 10/14/43 to 12/22/43—2-8/30 Months.			

OPA Equipment Rental—2-8/30 Mo. @ \$630.00.....\$1,428.00
 190½ Hrs. Operating Charge @ \$3.50 per hr..... 666.75

OPA Maximum\$2,094.75
 Total Actual Billing—L. & L.....\$1,524.00

#410 CAT & CARRYALL

#410 D-8 Caterpillar Tractor, 4 Drum Power Unit, Generator for Lights and Carryall Scraper, 21½ Cu. Yds. Struck.

	Month	Week	Day
OPA Equipment Rental Rate	\$1,975.00	\$656.00	\$164.50
OPA Approved Operating & Maintenance Service Rate @ \$4.90 per Hour.			

Possession: 10/16/43 to 11/9/43—25 Days.

OPA Equipment Rental—25/30 of \$1,975.00 (65.83 x 25 days)\$1,645.75
 42 Hrs. Operating Charge @ \$4.90..... 205.80

OPA Maximum\$1,851.55
 Total Actual Billing—L. & L.....\$ 487.20

(Testimony of Charles H. Miller.)

Defendant's Exhibit No. 22-B—(Continued)

#410 CAT & DOZER

#410 D-8 Caterpillar Tractor, 4 Drum Power Unit, Generator for Lights & Bulldozer.

	Month	Week	Day
OPA Equipment Rental Rate	\$1,095.00	\$364.00	\$91.50
OPA Approved Operating & Maintenance Rate	\$4.30 per hr.		

Possession 11/9/43 to 12/23/43—1 month 15 days

(Note #410 Tractor was used with carryall 10/16/43 to 11/8/43. Then it was used with dozer as above. See Carryall sheet.)

OPA Equipment Rental 11½ Mo. @ \$1,095.00.....	\$1,642.50
342 Hrs. Operating Charge @ \$4.30.....	1,470.60
OPA Maximum	\$3,113.10
Total Actual Billing—L. & L.....	\$3,106.81

#415 CAT & DOZER

#415 D-8 Caterpillar Tractor, 4 Drum Power Unit, Generator for Lights and Clearing Blade or Bulldozer.

	Month	Week	Day
OPA Equipment Rental Rate	\$1,095.00	\$364.00	\$91.50
OPA Approved Operating & Maintenance Service Rate	\$4.30 per hr.		

Possession—10/26/43 to 11/9/43—15 days

OPA Equipment Rental 2-1/7 weeks @ \$364.00.....	\$780.00
13 Hrs. Operating Charge @ \$4.30	55.90
OPA Maximum	\$835.90
Total Actual Billing—L. & L.....	\$118.17

(Testimony of Charles H. Miller.)

Q. Referring to these two portions of Exhibit 22, Mr. Miller, are these your computations on the Buckler job for the [196] graders and on the Lease & Leigland job? A. Yes, these are.

Q. And I have here another Exhibit 23. Give that to the witness, please. Referring to Defendants' Exhibit 23, is that an analysis that you have prepared showing the bare rental rates under Regulation 134 on the Goerig job, showing a variation in the amount? A. That is right.

Q. And the rate per hour—

Mr. Wagner: May I interrupt, Mr. Gentner? As I understand it, the witnesses to date, and the indications from the outset of Mr. Kuckenberg's testimony, disclose a defense on the basis of offset. Now Mr. Miller has indicated that he is using an OPA approved rate. Is that right? Is that a change in your theory of defense?

Mr. Gentner: No. That is the rate allowed by the OPA for operating and maintenance service on February 5th, 1943. That is in our contentions as shown in the pre-trial order, and as stated at the pre-trial that is the same contention that we have made right from the beginning. It is in every time that I brought it up here. There is nothing new about it.

Mr. Wagner: I understood you to say at the outset of the trial that either one theory or the other would be applicable.

Mr. Gentner: Well, I don't see how they both could. [197]

(Testimony of Charles H. Miller.)

Mr. Wagner: Very well. I just wondered if you were now on another theory of defense.

Mr. Gentner: Oh, no; we are not on another one at all. This is the same theory.

Mr. Wagner: Very well.

Mr. Gentner: We contend that we were allowed a rate by the OPA, which we are entitled to. That is the defense we always have used. And we will still contend further there was no fully operated rate allowed.

Mr. Wagner: Very well, Mr. Gentner.

Mr. Gentner: That has always been our contention right from the beginning.

Q. Mr. Miller, in your capacity in advising the public as to their rights here under this regulation during the latter part of 1942 and the first part of 1943, that was in the early stages of the making of regulations, was it not? A. Yes, it was.

Q. And, as a matter of fact, conditions were rather—well, uncertain as to rights under these regulations, were they not?

A. With particular reference to the machinery schedule 134. That one particularly, because considerable difficulty—

Q. Did you have anything to do with the Oregon Transfer Company case?

A. With that and many other,— [198]

Mr. Wagner: Objected to, your Honor.

Mr. Gentner: Well, I wanted to show his—

Mr. Wagner: No reason for injecting any other

(Testimony of Charles H. Miller.)

situation into this lawsuit whatsoever. It is entirely immaterial.

Mr. Gentner: —his qualifications for figuring, and the method that was used.

Mr. Wagner: He has already qualified.

Mr. Gentner: The method that the OPA used for figuring during this period. I think that is pertinent.

The Court: Well, don't go into it very much. I am interested only as to his qualifications.

A. Well, in that particular case, the Oregon Transfer case and any others, for that matter, when the parties would come in to find out the application of the regulation it was our job to help them apply that regulation to their problem, and on that particular job I laid out the recommendations for them to follow and the information for them to furnish in order to clear up a job which they had completed but were in doubt about as to its, should I say legality under OPA but had raised a question about OPA themselves and received a letter of commendation for the layout.

Q. Was your method of figuring that Oregon Transfer case the same as what you have submitted here?

A. Yes, identical, except I went further in this one and did the actual figuring, since I was no longer with OPA, [199] but the method of billing, and what to do and how to do it, was laid out by me in a letter.

Q. Was that letter to them approved?

(Testimony of Charles H. Miller.)

A. It was approved in a letter to my price officer to the Regional Office from Washington.

Q. And do you know how long it was after Amendment No. 3 became effective, which was October 22nd, 1942, before printed copies of the regulation were available for the public?

A. They were not generally available until late in January, because the first duties I had was in getting these regulations and distributing them. That was one of the big problems.

Q. January, 1943, then, was it?

A. January, 1943; that is correct; about sixty to—let's see. October—sixty to ninety days.

Q. Were you called upon to advise in regard to the matter of the manner of handling unusual wear and tear?

A. Yes, I was.

Q. And what were your instructions as to what to advise the public at the period that you were there?

A. Well, as price officers we were not permitted to make interpretations of the law naturally. We had to rely upon the memorandum and information from our local price officer or the Regional Office, or the National Office. Most of those were teletypes and interpretations and letters, and there was a mimeographed document sent out to us, questions and answers [200] on the regulation. Statements of considerations would come out, and it was from those documents that we would make the answers to the questions that were asked, to the best of our ability.

(Testimony of Charles H. Miller.)

Q. What was the manner that you instructed inquiries as to handling unusual wear and tear?

A. In the period before the Amendment 9, which came July 1st, 1943, I would say from January, February and March, along in there, would be the period, our understanding of the natural and unusual wear and tear was that the schedule provided rates for normal wear and tear and that the Office of Price Administration would not make decisions or pass on any other types of wear and tear, that should be taken care of by an agreement between the parties involved, and that was in the maximum statement of questions and answers sent out to us.

Q. Now the matter of applying for a rate occurred after Amendment No. 9 on July 1st, 1943, did it?

A. To my knowledge. Nothing was said in the mimeographed statement about applying for a rate for unusual wear and tear.

Q. One other question I had better be sure now about. These computations that you have made of these jobs of Goerig, Buckler, and Lease & Leigland, represent the approximate price allowance under Regulation 134 for the jobs covered?

A. That is correct.

Mr. Gentner: All right. [201]

Cross Examination

By Mr. Wagner:

Q. In connection with the Oregon Transfer situation that you mentioned, Mr. Miller, isn't it a

(Testimony of Charles H. Miller.)

fact that the Oregon Transfer Company submitted certain rates to the Washington office, pursuant to the Regulation early in 1943?

A. I don't know whether they did or not. I know what they did do, however.

Q. But isn't it a fact that those rates were refused and other rates suggested?

A. The first knowledge I have of it is when I received an order from the Price Officer in a teletype to take care of an interview with the Oregon Transfer people through their attorneys and assist them in applying their regulations to the job. Nothing was said to me about their rates.

Q. Isn't it a further fact, Mr. Miller, that you yourself, and the attorneys for the Oregon Transfer Company, worked from early in 1943, or from at least early in the month of July, 1943, until late in December, 1943, in justifying certain rates which had been awarded to it by application and reapplication to the National Office?

A. On my recommendation from the——

Q. Just answer the question now.

A. Yes.

Q. Isn't that a fact? [202]

The Witness: State your question again.

Mr. Wagner: Read the question, Mr. Reporter.

(The question was read as follows: "Isn't it a further fact, Mr. Miller, that you, yourself, and the attorneys for the Oregon Transfer Company, worked from early in 1943, or from at least early in the month of July, 1943, until

(Testimony of Charles H. Miller.)

late in December, 1943, in justifying certain rates which had been awarded to it by application and reapplication to the National Office?")

A. Not myself. Maybe the attorneys. I had one meeting with the attorneys.

Q. Is it not a fact that—I will say is it, or is it not, a fact that a great deal of correspondence was carried on between yourself and the National Office in connection with the Oregon Transfer Company rates?

A. None at all. I corresponded only with my Price Officer.

Q. And who was that?

A. Blair Stewart. Whatever correspondence would have been had was his.

Q. Do you know of any correspondence that was had between the Portland office and the Regional Office and the National Office in connection with the revision and establishing of certain rates under this regulation? [203]

A. Not before my resignation in August, because the work done was done at the conference at which you attended, so far as the local work was done; then the rest was turned over to me to make an outline of how to proceed, which I did.

Q. And you did that? A. I did.

Q. But you do know, as a matter of fact, the Oregon Transfer Company applied to Washington, D. C., and submitted a great deal of material in

(Testimony of Charles H. Miller.)

establishing and justifying the rates that were approved by them?

A. After the job had been completed. They made their application for rates after the job had been completed.

Q. You knew that? A. Yes.

Q. And you know that those rates applied to that particular job?

A. I never saw their rates.

Q. You didn't see them? A. No.

Q. Very well. This computation, what exhibit is it?

Mr. Gentner: You mean this last?

Mr. Wagner: Yes.

Mr. Gentner: 22. That is part of 22. That is on the Buckler case, isn't it?

Mr. Wagner: Q. The computation that you prepared, Mr. Miller, [204] referring to Exhibit 22, on what basis did you make the computation?

A. I used the bare rental rates, as shown in Regulation 134, effective October 22, 1942; that is 134, Amendment 3; and used the operating and maintenance service rates approved by the Washington office to Mr. Kuckenberg in a letter dated February 5, 1943.

Q. And pursuant to what provisions of what regulation did you make that computation in that manner? A. To Regulation 134.

Q. And what provision — any particular provision of the regulation that requires the computation to be made on that basis?

(Testimony of Charles H. Miller.)

A. Yes, sir. The regulation requires that the rental of equipment——

Q. Well, let's get the provision, first. What provision is it? Do you know that?

A. Offhand I can't name it, I think.

Mr. Gentner: Do you want a copy of the regulations, to refresh your recollection?

A. Yes. If I had a copy of the regulations I could tell you. I think it is Section 1399.4.

The Court: Do you want to borrow mine?

The Witness: Any one will be all right. Thank you.

The Court: He has mine. [205]

The Witness: Yes. Section 1399.6; and that is for the operating and maintenance service charges; and Section 1399.2, maximum rental prices. Just a minute. I believe those two cover it. That gives the daily, weekly and monthly basis. Section 1399.3, rates most favorable to lessee; and Section 1399.15, Appendix A, Table of Rates. I believe that covers it.

Q. Did you at any time take into consideration 1399.7?

A. Well, in fact, I considered the entire regulation, yes.

Q. Were you aware of the fact that during March of 1942, more particularly on the 31st day of March, 1942, that the Kuckenberg Construction Company had in effect certain rates for both operating and maintenance and bare rental, in other

(Testimony of Charles H. Miller.)

words, fully operated equipment? Have you ever been apprised of that fact?

A. Since working on this, yes, I have.

Q. Since working on this computation?

A. That is right.

Q. Then assuming you had known that, or had been previously apprised of that, would you have changed your method of computation or would you have continued?

A. I would have continued, because, to my knowledge of the regulation as a price specialist there is no way to apply a fully operated rate at the period covered on specific authorization from Washington, the Washington Office of Price [206] Administration.

Q. Were you aware of the fact that on January 5th, 1943, Kuckenberg Construction Company had made application to the Washington office for approval of certain rates?

A. A copy of that letter was in my office while I was with the Office of Price Administration.

Q. Were you aware of the fact that the March 31st of 1942 rates that the Kuckenberg Construction Company had in effect were other and different than those reported rates?

A. As of what time?

Q. As included in the January 5th letter.

A. You mean January 5th, 1943, was I aware?
At what time do you mean?

Q. Have you ever been aware?

(Testimony of Charles H. Miller.)

A. Oh, I was aware of the situation since I worked on this job. Yes, I knew that the two rates——

Q. And knowing that situation, would you have changed your method of computation?

A. Not at all. I can't possibly see any way to change it. But the method used on the Kuckenberg job is the same identical method I used to outline the job just mentioned while I was with OPA.

Mr. Wagner: That is all.

Mr. Gentner: That is all.

(Witness excused.) [207]

Mr. Gentner: I guess we are back again to Mr. Kuckenberg.

The Court: Well then, we will take the afternoon recess.

(Short recess.)

Mr. Gentner: Take the stand, Mr. Kuckenberg.

Mr. Wagner: I would like to recall Mr. Miller, if I may, for just a question or two.

CHARLES H. MILLER

was thereupon recalled as a witness in behalf of the defendants and, having been previously sworn, further testified as follows:

Further Cross Examination

By Mr. Wagner:

Q. Referring to Maximum Price Regulation 134 and its application, Mr. Miller, Paragraph 1399.6

(Testimony of Charles H. Miller.)

under that subparagraph A, does that set forth the particular method of pricing?

Mr. Gentner: Pricing what, Mr. Wagner? I will object to that question. Pricing what? You see, the rents are divided up into two portions, the bare rental and the operating and maintenance service. Now are you referring to the operating and maintenance service, or——

Mr. Wagner: The price itself speaks pretty well for what it is supposed to price. What is it supposed to price?

Mr. Gentner: Your question didn't cover that.

The Witness: Are you asking me this question?

Mr. Wagner: Yes. [208]

The Witness: Section A, or 1399.6?

Mr. Wagner: That is right.

The Witness: The maximum price is for services.

Q. And what do those services include?

A. The operating and maintenance service.

Q. And does it include anything else?

A. Nothing else.

Q. How about the subparagraph B?

A. Subparagraph B contains maximum prices for services.

Q. Of what kind?

A. In the case where the party did not have an established service charge, as defined in the previous section.

Q. And in your application of this regulation, and in your opinion, are those two methods of pricing

(Testimony of Charles H. Miller.)

ing consistent, would you say, or are they inconsistent?

A. Well, they are consistent, as far as I can see, except the Section A has never applied in this area, so far as my administration was concerned. No one qualified under it.

Q. Would you say most methods of pricing in the application of the regulation should be applied simultaneously, or are they to be applied in the alternative? A. In the alternative.

Q. In the alternative? A. Yes.

Mr. Wagner: That is all. [209]

Mr. Gentner: I have no questions.

(Witness excused.)

HENRY KUCKENBERG

thereupon resumed the stand as a witness in behalf of the defendants and further testified as follows:

Cross Examination—(Resumed)

By Mr. Wagner:

Q. My recollection, Mr. Kuckenberg, is that we were discussing, just before the noon recess, some discussions that you had with Mr. Blair Stewart in connection with prices? A. Yes.

Q. Can you tell us just when that took place?

A. It was from January 8th or January 9th, as our contract is dated January 9th.

Q. And one other thing, just before then we were going to ascertain, if possible, during the noon

(Testimony of Henry Kuckenberg.)

hour, when it was that you first went up to the job.

A. It was about January 4th.

Q. About January 4th?

A. Either the 3rd or the 4th.

Q. The 3rd or the 4th. Now what discussion, if any, did you have with Mr. Blair Stewart?

A. I told him that we had an unusual condition up there; that we had entered into a contract with Georig to furnish certain [210] equipment on a rental basis and after our equipment was on the job we found that the job had been misrepresented to us and that there was unusual wear and tear there, and our repairs and breakages were way beyond normal and asked him if he could enter into an agreement, and just what kind of an agreement we could enter into. I told him it was our idea that they should pay for breakages, outside of normal wear and tear, but that Goerig wanted to pay a straight per-hour price and asked him how we would go about doing that. You told us to draw up an agreement, an addendum to our original agreement, and cite the facts there of our meeting and about the misrepresentation of the original job, and set the price forth in there and who was at the conference which we put into the addendum.

Q. Was this conversation that you had with Mr. Stewart by telephone?

A. Yes.

Q. Or personally?

A. By telephone.

Q. Did you at any time go over to the office to personally discuss this with him?

(Testimony of Henry Kuckenberg.)

A. I was never in your office until the time we took our records up there in OPA.

Q. Was this the only conversation that you had with Mr. Stewart?

A. On this particular point, yes. [211]

Q. Did you ever have any—

A. I talked with Mr. Miller, however, later, possibly in March or April, about the billing of it and asked him if we should bill it as a price of \$13.60 per hour or if we should break down the \$2.00 per hour as a separate item, and at that time he advised me to break it down as a separate item.

Q. Did you discuss your billing with Mr. Stewart at all? A. I don't believe so.

Q. Did you ever have any occasion to contact the Seattle Office of Price Administration in connection with this work? A. No, I never did.

Q. Did Mr. Goerig ever indicate that he had contacted the Office of Price Administration in connection with it?

A. Not to my knowledge. I don't think I ever talked with Mr. Goerig since the job has been completed.

Q. Well, this conference that you had after you came down to Portland from the job?

A. That was in January.

Q. Was it in January? A. That is right.

Q. The 8th or 9th? A. That is right.

Q. That was Mr. Goerig, was it not?

A. That is right.

Q. Now at that time, or at any other time, did

(Testimony of Henry Kuckenberg.)

Mr. Goerig [212] ever discuss OPA prices for these services with you? A. No.

Q. He never did? A. No.

Q. Were you aware of the fact that there was a regulation governing prices on this type of equipment?

A. It was the latter part of December that the A.G.C. mailed us a copy of the 134 3 Regulation. That was the latter part of December, and it was that time that I first called up the Price Administrator, or the price man, and that was Mr. Stewart, and that was the first time I had talked with him, and at that time I asked him how we should apply, and it was from that conversation that we made our application of January 5th.

Q. And from your only conversation with Mr. Stewart?

A. That is right. We had several. I called him several times on it.

Q. But you had more than one, then, with Mr. Stewart?

A. Not in relation to the \$2.00 an hour. This was on our application for a fully operated price. That is a bare rental and a maintenance and operation price.

Q. Did you personally attend to filing your rates with the Washington office?

A. Did I personally go back there?

Q. No. Did you personally attend to the filing or mailing [213] of your application?

(Testimony of Henry Kuckenberg.)

A. Yes. I mailed it back there.

Q. You mailed it? A. Yes.

Q. Do you remember what date it was?

A. I imagine it was the date of the letter.

Q. On January 5th? A. I presume so.

Q. And you were back here in town immediately after you went to Bremerton on the 4th?

A. That is right.

Q. You filed your application then?

A. Uh huh.

Q. And at that time was the first time you had discussed the situation with Mr. Stewart?

A. When?

Q. When you filed this application?

A. You mean previous to that?

Q. Well, no. I am just trying to find out when the first time was that you undertook to ascertain what was necessary in connection with the regulation governing the prices of rental.

A. Well, it could have been any time the latter part of December or the first part of January. I don't remember the exact date that we got the regulation but it was sometime the latter part of the year. It might have been a week before we filed, because [214] it took some time to gather this information and get it ready. It might have been two weeks, even. I don't remember the exact date.

Q. You had a copy of the application mailed to you then?

A. By the A.G.C.; not by the Office of Price Administration.

(Testimony of Henry Kuckenberg.)

Q. The A.G.C. did?

A. They mailed it to their association members.

Q. That was late in December or early in January?

A. As far as I remember, yes. And these prices that we sent back there were based on the prices that we used as of March 31st, 1942, plus an increase in wages. Our wages prior to March 31st of 1942 were a dollar and a quarter an hour and on March 31st, or shortly thereafter, the rate was raised to \$1.60, and that was taken into consideration in this application.

Q. Did you discuss that with Mr. Stewart?

A. Yes.

Q. Did you discuss that with your A.G.C. representative? A. Yes.

Q. What did Mr. Stewart say about that?

A. Put it in there.

Q. He said make an addition to your prices?

A. That is right.

Q. For your labor increase?

A. That is right. [215]

Q. And when did he tell you that, in which conversation?

A. Oh, it could have been the first or the second one. I don't remember.

Q. Well then, as a matter of fact, Mr. Kuckenberg, the prices that you were submitted January 5th, 1943, were not the prices that you had in effect on March 31st, 1942?

(Testimony of Henry Kuckenberg.)

A. They were with the increase in wages.

Q. Well now, wait a minute. Is that the only difference there was? A. That is right.

Q. But actually they were not the same rates that you had?

A. Yes. They are the same rates, with the addition in wages exactly.

Q. Did you in your application disclose that there was an addition by reason of any wages, wage increases?

A. Well, I don't remember. But the letter would speak for itself. I don't have one before me here.

Q. Do you recall what prices you paid for your equipment, Mr. Kuckenberg?

A. No, I don't.

Q. Do you have records indicating that?

A. Yes, we do.

Q. Were you here when Mr. Byrne testified?

A. Yes, I was.

Q. Did you hear the figures quoted by him? [216]

A. Yes, I did.

Q. Did they sound to be in line?

A. As far as they went they were, yes.

Q. As far as they went? A. Yes.

Q. What do you mean by that?

A. We have other equipment there he didn't give any prices on.

Q. What other equipment?

A. On each tractor there is a light plant on it.

Q. A what?

(Testimony of Henry Kuckenberg.)

A. A light plant. There is a bumper in the front of each tractor, on the carryall there is—it comes with 300-foot spools of cable and ours are all equipped with a thousand foot spools of cable and we have built up the bumper blocks.

Q. What are the bumper blocks?

A. Oh, it is a block in the back that we have built up. We have built the cat edges on the sides. in other words, we have put possibly another thousand dollars on the scraper before we send them out.

Q. Do your records indicate that?

A. Our records?

Q. Yes. A. Sure they would.

Q. Did you submit those records to Mr. Miller when he made [217] this computation?

A. No.

Q. Any particular reason for not doing that?

A. Why would I? I didn't give him any prices.

Q. No. I can't get the relevancy——

Mr. Wagner: No. I was wondering if the records were available or if they were not.

A. They are in my office, not here.

Mr. Gentner: You mean if this were included in the price asked Goerig? Is that what you are trying to get at?

Mr. Wagner: No. I just asked him whether records were available indicating the value of this added equipment.

Mr. Gentner: I don't see what Mr. Miller has to do with the cost of equipment when he is figuring prices.

(Testimony of Henry Kuckenberg.)

Mr. Wagner: All right. I will withdraw the question.

Q. Are the records available for the different equipment? A. Here?

Q. No. I mean are they available at your office? A. Yes.

Q. They haven't been so far? A. Oh, no.

Q. You mentioned during the course of construction up there, or shortly after the equipment was ordered off or the job shut down because of the breakage in the equipment, that you wanted to take your equipment off the job entirely. [218]

A. That is right.

Q. And that the Army stepped in and held the equipment?

A. They requested that we leave it there, yes.

Q. Who did that, do you recall?

A. I don't recall his name. Some Colonel with the Army Engineers at Seattle.

Q. How did that order come to you?

A. Which order?

Q. The order? A. By letter.

Q. The order of the Colonel.

A. Requesting us to keep our equipment there?

Q. Yes.

A. It came by letter.

Q. By letter? A. Yes.

Mr. Wagner: Do you have that letter here?

Mr. Gentner: I have that letter here somewhere. If you want it I will dig it out and give it to you.

Mr. Wanger: O.K.

(Testimony of Henry Kuckenberg.)

The Witness: That was a letter. That was in possibly February or March, and that was long after our contract had terminated, because we had rented it out for sixty days and our contract had definitely specified that.

Q. That wasn't the subject of the conference or conversation [219] that you had with Mr. Goerig on the 8th or 9th?

No, that wasn't the time. It was either the first part of March or the end of February we obtained a contract to build an airport at North Bend and at that time we required our own equipment and it was leased, although on that basis, that if at any time after sixty days we required the equipment we could get it, so we wrote them a letter and gave them a reasonable length of time so they could secure other equipment in order to release ours, but they requested—the Army Engineers requested that we leave it there, so we left it there.

Q. During the conference that you had with Mr. Goerig did you indicate to him that you had available for that work up there power shovels?

A. We didn't have any available.

Q. You didn't have any available?

A. No.

Q. Where were they then? A. Spokane.

Q. In Spokane? A. Uh huh.

Q. You had none here?

A. None here. If we had them here they were not right. I don't remember exactly, but I know that most of them were at Spokane. [220]

(Testimony of Henry Kuckenberg.)

Q. Did you make available for the job up there a ripper? A. Yes.

Q. One?

A. One, yes. That is all we owned.

Q. That was up there for how long after that?

A. Well, when they requested the ripper we sent it up there. It stayed there until they got through with it and sent it back. I don't remember the exact dates, but as soon as they requested it we sent it up there.

Q. Who requested it?

A. Well, Goerig, or his superintendent?

Q. They asked for it? A. Yes.

Q. I am handing you Defendants' Exhibit 8, which you have testified to as being a cost summary. From what figures are those taken?

A. Well, they are taken from our payrolls and from the invoices, from payrolls both at Portland and Bremerton.

Q. And are those payrolls likewise summarized?

A. Yes.

Q. Are they here? A. Yes.

Q. Are they also disclosed on their repairs?

A. Here?

Q. Yes. [221] A. Yes.

Q. And are they likewise summarized here?

A. No. They should be on the daily reports, not on the payroll.

Q. Well, will you select from here what the daily reports are? Hand those to the witness, will you, please.

(Testimony of Henry Kuckenberg.)

Mr. Gentner: I have this letter of the——

The Witness: These are a summary——

Mr. Wagner: Oh, that is all right. We will take them later on.

The Witness: These are a summary of the parts and labor used on repairing each tractor.

Q. Are those included, the original documents, included in one or the other of these folders?

A. Yes.

Q. Exhibits 33 and 34?

A. That is right.

Q. You know which one they are?

A. In both?

Q. In both. Hand this to the witness.

A. This covers both labor and parts.

Mr. Wagner: Hand this to the witness and put the board up. If the Court please, is it permissible for me to observe the figures with the witness?

The Court: Yes. [222]

Mr. Wagner: Q. Referring to Exhibit 8, cost summary, I have a column captioned "Unusual Repairs", a total of which is \$33,552.63. Will you explain where these figures originated from. Can you do that?

A. From these payrolls and these bills.

Q. Are these figures as included in the bills, or are they taken from a recapitulation here of Exhibit 26?

A. This recapitulation here totals \$33,552, the same as that. This is a recapitulation of the bills and payrolls.

(Testimony of Henry Kuckenberg.)

Mr. Wagner: I see. All right.

Mr. Gentner: Mention the exhibits so they will show in the record. When you say "this" it don't mean anything. Exhibit 26.

Mr. Wagner: Q. Referring now to Exhibit 26, the left-hand column, captioned "Tractor No." is the figure 414. What does that indicate?

A. That is the number of the tractor.

Q. The number of the tractor. And from under the caption "Parts" is the figure \$2,370.46. Can you in connection with that figure show us where the original documents are?

A. Here is the summary of the original documents. "Final Drive Out (down until 1/14), Bremerton labor \$109.00; parts \$215.03. Replace tracks, 12 rollers", gives you what it is and the dates that the work was done. Then that was taken from bills and on our daily reports here it will show that [223] work was done on 1/8-14/43. I believe 414 is not in here, so it is being repaired upon. It does not show in here as working.

Q. What we are trying to arrive at is this figure over here, \$2370.46.

A. It is right here, \$2370.46.

Q. All right. Now we want the original of this. Referring to the second page of Exhibit 26 we want the original document as described at the top of the page.

A. Well, that will be taken from there.

Q. "1/8-14/43, description, final drive out."

(Testimony of Henry Kuckenberg.)

A. That will be taken from one of these bills. I think that these charges were marked here on the daily reports. I don't seem to find them. On our daily report here this tractor was out from the 8th to the 14th, our No. 61. I had checked, too, for 414 but it is marked down. That means repairs across to there (indicating). And it started working again on the 15th.

Q. You are reading from what, Mr. Kuckenberg?

A. This is daily report from our foreman on the job, or a weekly summary of the daily reports.

Q. That is right. Here it is entitled recap sheet time for Walsh & Hammond; is that right?

A. That is right.

Q. Who are Walsh & Hammond? [224]

A. Well, at that time we understood that they were subbing this work from Goerig. We were renting to Goerig and they were acting as superintendents, or subs, or whatever you want to call it.

Q. And, therefore, no charge price for 414, for Tractor No. 414, was indicated; is that right?

A. That is the same as 61. It is marked there 61, or 414.

Q. Those figures are taken, then—

A. From here (indicating), as far as the time of repair is concerned.

Q. What do these figures indicate here?

A. The hours that the equipment operated, when it is in operation. When it has an hour there it means it is being repaired.

(Testimony of Henry Kuckenberg.)

Q. How did you arrive at this figure 109?

A. That is the labor that is computed against that particular tractor.

Q. Now what is the basis of computation there?

A. That was taken from the payroll.

Q. Taken from the payroll?

A. That is right. And these time sheets are with the payroll.

Q. You mean that amount of labor was deducted from the payroll?

A. No, not deducted. It was picked out of the payroll and put in here.

Q. On what basis?

A. Just what do you mean, what basis? [225]

Q. Well, here you are making a charge for unusual wear and tear.

A. That is what we paid the men that worked on that repair, that \$109.

Q. Is that what your record indicates?

A. That would show that it was done, yes; then the time that was picked off of the payroll for certain men that worked on that particular tractor.

Q. So that your computation is not based on any timecards for natural repair. It is just an estimate of the repair expended by reason of the fact that the tractor wasn't working; is that right?

A. No, that is not right. These records were made up under my supervision by Mr. Gordon and Mr. Giebisch. They were the men who actually had the men working under them and they made up these reports and picked out the time.

(Testimony of Henry Kuckenberg.)

Q. You are referring to what when you say "these reports"? A. This summary.

Q. That is Exhibit 26? A. Yes.

Q. And then we come to this first item on the second page of Exhibit 26, where it says "Final Drive Out", and that was a charge for labor, \$109?

A. That is right.

Q. Now what I am trying to find out is, where did that \$109 [226] come from? How did you figure it?

A. It came off of the payroll and off of the daily report.

Q. Let me see the payroll, then.

A. It came off of the payroll.

Q. Where is it? You point it out to me. Now you are reading from a certified transcript of labor payroll, Payroll No. 7, Sheet No. 1, of 1 Federal Project? A. That is right.

Q. Washington, County of Kitsap, week end January 16, 1943?

A. It says Kitsap County Airdrome.

Q. Will you explain to me how the figure \$109 is arrived at from that payroll.

A. Well, it was the labor that was expended in the labor of that particular final drive.

Q. What on this particular sheet, this Sheet No. 1 of 1, Payroll No. 7, January 16th, '43, what figures indicate a charge for labor of \$109?

A. Well, it is taken from these various men that have worked there. This is a sumamry of it.

(Testimony of Henry Kuckenberg.)

Q. Will you point out to me just what figures were taken?

A. Well, part of all of these figures; parts of all of them.

Q. Well, what parts of what figures? About how many figures are on that sheet, Mr. Kuckenberg?

A. Well, there is a few on here.

Q. Fifteen columns of figures, running about 24 figures deep? [227]

A. Uh huh.

Q. Fifteen columns across?

A. I don't have a breakdown sheet to give you man for man. If that is what you want, I haven't got it here.

Q. What I am trying to find out, you made a computation here and you are putting it in evidence, or attempting to, Mr. Kuckenberg?

A. That is right.

Q. I am trying to find out—you are doing it as an offset?

A. Yes, that is right.

Q. What I am trying to find out is how you made it up. Where did you get it from?

A. We made it up from these figures.

Q. Can you explain to the Court how you made it up?

A. We took the men that worked on that particular item, added them together and put them down here in our recap.

Q. Just show me where it came from.

A. It came from the payroll.

Q. Show me off of this sheet what figures were used to get them?

(Testimony of Henry Kuckenberg.)

A. I haven't got them in my mind. I can't remember.

Q. How would you arrive at them? This is made under your supervision. How would you arrive at \$109 for the figures on this sheet?

A. It probably took six men to do that work. If it took six [228] men a day and a half at whatever it was it would make \$109.

Q. What particular men and what days did you take off of this sheet here?

A. I don't know.

Q. You don't know?

A. No, I don't know.

Q. Following out your method of computing this offset, what ones should be picked out to arrive at this figure?

A. It would possibly be the tractor operator and the mechanic. It would just be a guess on my part, because I don't have the work sheet here covering it.

Q. Do you have that work sheet?

A. Not here.

Q. Where is it?

A. We should have it at the office. It was made up.

Q. Then the original documents in these two folders are not the documents that are used as a basis for making this report?

A. Yes, they are. The payroll is here, which covers the time that has been paid for that work. It is just that we don't have the breakdown.

(Testimony of Henry Kuckenberg.)

Q. Now Mr. Kuckenberg, can you explain to the Court, and to Mr. Gentner and myself, just exactly what method you used? We are just trying to find out evidence here now. A. Sure.

Q. Just exactly what method was used in arriving at this \$109 [229] charge here. Can you explain, in ordinary language, so that we will understand it, just how you arrive at that.

A. A machine broke down and so many men worked on it. Those men are covered on this payroll and have been paid, and that time is added together and put down here in our summary, and the parts are the parts that have gone on there and are covered by these bills.

Q. Now let's stay on the payroll. We are still talking about this \$109 here. A. Uh huh.

Q. Now so many men worked for such and such a length of time? A. That is right.

Q. Now what on these payrolls there indicates that is the fact? Let me ask you this: Approximately what part of this \$33,552 was made up of charges that were arrived at by that same method of computation?

A. What do you mean—on payroll?

Q. Yes.

A. Well, there is only \$2,000 on payroll at Bremerton and \$5,000 in Portland.

Q. On payroll? A. That is right.

Q. And those items, and those totals were taken from the same records here that you have?

A. Yes. [230]

(Testimony of Henry Kuckenberg.)

Q. Payroll records; is that right?

A. That is right.

Q. They were computed on both the Bremerton payrolls and the Portland payrolls?

A. That is right.

Q. Just in the way you have explained?

A. That is right. We have gone through the payrolls and figured out the length of time it took, and the men it took on that particular job.

Q. That is something. How did you figure it out? That is what I want to know.

A. If a man worked five hours at a dollar an hour it would be \$5.00.

Q. For what period of time?

A. For five hours.

Q. Well, you are saying five hours. What do you mean, five hours?

A. You asked me how we figured it. I was trying to show you how we figured it.

Q. The length of time to get it done?

A. No. The length of time they were repairing.

Q. The length of time they were repairing. Do those payroll figures indicate that the particular men listed there were doing repair work on the tractor? A. No. [231]

Q. What do they indicate?

A. They just indicate they worked on that job.

Q. Let's look at the sheet again we were referring to.

A. It just indicates that this particular payroll covers that job of the Kitsap County Airdrome.

(Testimony of Henry Kuckenberg.)

Q. And these are the men that were working that airdrome? A. That is right.

Q. And these are the hours?

A. That is right.

Q. And this is the amount they were paid?

A. That is right.

Q. And the other column is what?

A. What does it say?

Q. Well, you read it. It is your exhibit. Read it. A. Which column?

Q. Read them all right across the top here, reading from—let's get back to the sheet where we were when you picked out one as being the one from which the figures were taken to make this \$109 charge up.

A. It states here the name of the state, the name of the employee—

Q. Are you reading from January 9th? Is that the one we originally had?

A. Yes, sir. Name of employee, hours worked each day, total hours worked, rate per hour, total amount earned, defense [232] stamps, social security, medical aid, Victory tax, hospital and balance due.

Q. Now you have a figure of \$109?

A. That is right.

Q. What records would indicate which of those figures to pick out to make up that \$109, if that is the way you computed it?

A. Well, it was picked off of these reports here.

Q. Daily reports?

(Testimony of Henry Kuckenberg.)

A. That is right. We know this tractor was down on here on the 10th, 11th, 12th and 13th, and started back to work again on the 14th.

Q. What indicates that, Mr. Kuckenberg?

A. Right here. This would indicate it. We know that the machine has not gone back to work. Then that time was picked off of here by Gordon and myself as to the amount of hours that the men worked on that particular machine at that time.

Q. Now what are you reading from?

A. Well, these are the men here who operate.

Q. Yes. A. And the men were——

Q. What sheet are you reading from?

A. This is a daily report.

Q. Daily report; operators' report dated January 16, 1943?

A. That is right. That covers all the machines that were [233] working.

Q. You have a list of operators there?

A. That is right.

Q. How many of them?

A. Two, four, five on that date.

Q. They were all working on tractors, repairing them? A. No.

Q. Which ones were working?

A. They were operating.

Q. They were operating?

A. That is right.

Q. Which ones were repairing?

A. The ones that are not operating would be taken from this payroll. This covers all the oper-

(Testimony of Henry Kuckenberg.)

ators. It covers one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen.

Q. Eighteen operators? A. That is right.

Q. And there are four on that?

A. There are five on this page.

Q. Five on that daily report?

A. And there are two, four, six here, which makes eleven. So it means there were three repairmen that particular day.

Q. So that, by virtue of the lack of records as to what the [234] men were doing, you made a computation as to the fact, or in order to establish the fact that they were doing repair work on the tractor; is that right?

A. If they are not here working on the tractors they would be repairing, if they were carried on the payroll. Yes, that is correct.

Q. By virtue of the lack of records? By virtue of the lack of records you arrive at the fact that they were working on a cat? What I am getting at, Kuckenberg, is, that there is not any record that directly indicates they were working on the equipment?

A. That is the record that indicates it, yes. That is the only record we have that would indicate it. We paid them. They worked there. They have been on repairs, and if they are not shown here as working on tractors they would have been on repairs. That would be the way we keep it.

(Testimony of Henry Kuckenberg.)

Q. So that in this computation, then, all of the time for which the tractor was not being operated that was charged to that job is multiplied by the total number of hours, of men that were not working on the job operating but still being carried on the payroll?

A. And their repairmen. Yes, that is correct.

Q. But there is no record that indicates actually that they did do repairing, such as going into a workshop and arranging a timeclock? [235]

A. No. We didn't have a time clock.

Q. And there is not a timekeeper on the job keeping it?

A. Yes. Mr. Giebisch is there to keep the time.

Q. He kept the time? A. That is right.

Q. And he kept the time for repairs, did he?

A. Yes.

Q. He did? A. Yes.

Q. Where are those records?

A. Right here. Anything that is not on operation is repairs, and that is the way the time is kept.

Q. Well then, will you just calculate from this sheet, then, what figures were taken to make up this \$109? Pick them out there for me.

A. These two here on the bottom, likely.

Q. Now you are referring to what document, Mr. Kuckenberg? A. To the daily report.

Q. For week end January 16th? A. Yes.

Q. The one headed time for Walsh & Hammond?

A. That is right. This is a daily recap made by the foreman on the job, by Gordon Giebisch, and

(Testimony of Henry Kuckenberg.)

that was sent in to the office and this payroll was made from this, and these would be repairmen right here; they would be Kuhlman and Brand on [236] that particular job.

Q. You are reading from a sheet that is a recapitulation of what? A. Of these daily reports.

Q. Of those daily reports?

A. It is a recapitulation in one way and it is a time sheet in another.

Q. Now explain that?

A. He has kept his time here for the employees that have worked on this sheet and this is that daily report made up for the operation of the equipment and this is the time of the employees. There are two separate and distinct forms here.

Q. I understand that, but this is a recapitulation? A. Of the labor.

Q. Of the labor here?

A. No. This is the daily report—

Q. Explain that now. I mean, we are reading from operators' report now?

A. That is right.

Q. The reason I am asking this is so it goes in the record.

A. This is a report of the equipment and the hours that it has worked, and who the operator was working it, and this is a report of the labor we have paid the various operators and mechanics and anyone working on the contract. [237]

Q. So that if a piece of equipment worked for ten hours during one day the operator for that

(Testimony of Henry Kuckenberg.)

equipment would likewise be working ten *hours* during the day; is that right?

A. He might be working twelve. He might be ten hours in operation and two hours on repairs.

Q. That is not indicated there, however?

A. Yes, it would be indicated here. Here is the time that the tractor is worked right here. That is the hours that the tractor has worked.

Q. That is Marvel?

A. Marvel is 9½ hours. That is tractor work. Over here on the 10th he worked ten hours, as far as we paid him for ten hours.

Q. Who are these operators' report sheets kept by?

A. These were all kept by Gordon Giebisch. He made these up, and this was turned in to Goerig—Georig's superintendent. It would be Goerig's man. This is made up in dupliacte. He kept one copy, we got one copy, then it was signed by the superintendent on the job. These signatures are of the various foremen, I would say, that were around at that particular time. We have to get them for the operation of the equipment.

Q. I see. Now we are getting down to this \$109 figure.

A. Yes. That is right here. That is covered by Kuhlman and Brand.

Q. And can you compute that for us? This sheet, captioned [238] time for Walsh & Hammond, week ending January 16th, 1943, down about the

(Testimony of Henry Kuckenberg.)

middle of the page lists Alfred Kuhlman and C. B. Brand, is it? A. Yes.

Q. With the Kuhlman to the right, indicating figures for Kuhlman 10, 11, 12, 11, 12, 10 and 4?

A. Yes.

Q. And for Brand indicating 10, 10, 11, 10, 12, 10 and 11. Now from these figures you computed——

A. One hundred nine dollars.

Q. One hundred nine dollars? A. Yes.

Q. Now tell us how you did it?

A. Well, Giebisch was on the job and knew the days that the men worked on that particular repair and from that this report here was made.

Q. Giebisch was on the job? A. Yes.

Q. Knew the men? A. That is right.

Q. Knew what dates they worked?

A. That is right.

Q. On repair work? A. Yes.

Q. You mean he remembered that? [239]

A. Yes.

Q. He took that from his own recollection?

A. From the reports here, yes.

Q. Together with this report, plus his recollection?

A. Uh huh.

Q. This figure of \$109? A. That is right.

Q. And when was this computation made?
When was this typed up?

A. I don't remember the exact date.

Q. It was typed up for the purposes of this trial?

A. I don't remember.

Q. What do you call these papers?

(Testimony of Henry Kuckenbergl.)

A. They are a recap of—this is a recap of repairs Bremerton tractors due to unusual breakage, wear and tear, working under extremely hazardous conditions.

Q. And this breakdown of the cost summary, without any doubt on it, was made up in your office, was it? A. Yes.

Q. And who made that up?

A. Well, it was made up by Gordon and Giebisch and myself.

Q. And who typed it?

A. Oh, I don't remember. A stenographer in the office. I don't remember who it was.

Q. Is this your ordinary method of segregating all of your [240] accounts? A. Yes.

Q. Into unusual repairs and ordinary maintenance and repairs?

A. If the conditions warrant a computation:

Q. You have always done that in the past?

A. No, we haven't always done it.

Q. Have you ever done it before?

A. No, I don't think we have.

Q. This method of using Mr. Giebisch's recollection, together with these time reports, and computing the total claimed for the labor part of the unusual circumstances, and wear and tear, was the only method that was used; was that a fact?

A. Yes, that is right.

Q. That is the only method that was used, or were any other methods employed?

(Testimony of Henry Kuckenberg.)

A. We didn't keep a record of unusual wear and tear, if that is what you mean. We had a record of repairs in here and from that we have picked out what we believe is an unusual wear and tear, except the parts we know have gone in it in general wear and tear.

Q. Now this figure of \$109 that we are talking about here—— A. Yes, uh huh.

Q. ——is captioned——

A. Bremerton labor, yes.

Q. Bremerton labor? [241] A. Uh huh.

Q. And now, tell me this: What record, if any, indicates that those repairs were for unusual wear and tear, or whether they were for ordinary wear and tear?

A. Well, we have kept the best records we have known how. We have picked it out. We know putting in a final drive is nothing new for us, and we know approximately how long it takes, and that record was gathered that way. We don't have an actual record of the unusual repair.

Q. Then your segregation as to the usual and ordinary wear and tear, and for the unusual and extraordinary wear and tear, then, is merely based upon recollection; is that a fact?

A. Recollection and what it has cost us in the past to do that particular work, yes. We didn't know a lawsuit was coming up. We didn't know we needed the unusual wear and tear——

(Testimony of Henry Kuckenberg.)

Q. Are all of those computations, in which you claim thirty-three thousand some hundred dollars, are all of those computations based upon the same method?

A. We used these parts on that particular job, these repair parts, and there were certain of these repair parts that were used on unusual wear and tear and breaking, and the rest goes into the motors or different working, or different breakages that are normal, and there are ones that are normal and the others that are usual we have put into the unusual [242] column.

Q. What would indicate breakage as normal or abnormal?

A. For instance, on our tracks——

Q. What gage do you use, Mr. Kuckenberg?

A. For instance, on our track assembly, below, we know, according to our records, that the tracks are worn out in about 500 hours and had to be replaced.

Q. According to what?

A. According to our records.

Q. According to your records?

A. And the normal wear and tear of that equipment is for 4000 hours, so we know there is unusual wear and tear there, and any time that we tear a tongue out, or blow out a tire, a perfectly good tire, we know that is unusual wear and tear. But if something wears out from fatigue, or a motor needs re-ringing or needs a new crankshaft, we know that

(Testimony of Henry Kuckenberg.)

is just ordinary wear and tear and we expect those things.

Q. All right. Now did you in your computation here make a distinction as to the rings and the ordinary shafts, and the piston wear or motor wear as against the track wear? A. Sure.

Q. You did? A. Uh huh.

Q. And all of the charges that you have there for wear on track assemblies are in your classification of the unusual [243] and extraordinary wear and tear? A. No.

Q. I mean, is that the way you made it?

A. Yes. I would say where we put on new tracks and new rollers at 500 hours and they should have given work of 4000 hours, we would charge 80 per cent or 90 per cent of that track as against unusual wear and tear, and that comprises our \$32,000. Yes, that is correct.

Q. Now do these records indicate whether a track replacement or track assembly went for 500 hours or for 4000 hours?

A. Well, we know that we had seven or eight tractors there, and that each one of them ran approximately a thousand hours, and most of the tractors here, I put on here at least two sets of tracks and rollers and the like of that, so we know they ran about 500 hours. That is correct.

Q. You mean during the course of this particular work? A. Yes, that is right.

Q. You put two sets on each machine?

A. That is correct.

(Testimony of Henry Kuckenberg.)

Q. And the charges for those are in these folders right here, are they?

A. That is correct. We don't keep the records at the time of the work, because we don't know anything about those. They usually come up and we don't keep that kind of record, and with the shortage of manpower we possibly don't keep the [244] records that we should, because everyone is trying to produce.

Q. Now also, Mr. Kuckenberg, you have items of Portland labor and Bremerton labor. How did you distinguish as to your Portland labor and which labor went to unusual wear and tear on the Bremerton job, or the equipment used on the Bremerton job?

A. Well, when the tractors came into Portland we overhauled them before they went on the next job, and what was breakage or unusual wear and tear was segregated and charged that way.

Q. O. K.

A. Just the same as they were on the Bremerton job.

Q. Were there any other items included in here besides track assemblies with total unusual wear and tear, or went into the computation for unusual wear and tear?

A. Well, take, here, for instance, on the first tractor, No. 61, or 414, there was a final drive went out and then we replaced a set of tracks.

Q. What is a final drive going out?

(Testimony of Henry Kuckenberg.)

A. The final drive works on the beveled gear on the side of the tractor that turns the sprocket that runs the tractor, and that is based on a shaft and bearings and gears. On the outside of that there is a bellows that works, a bellows seal, and that bellows seal, when sand continues to go around it breaks the bellows seal and the grease leaks out of there because it is full floating and full of grease and [245] the grease will work out and sand and gravel work in. When that happens the bearing goes out, and so the whole side of your case and gears and everything else go with it, and that happened quite frequently on the particular job due to the nature of the material that we were working in.

Q. All right. How many such final drives went out there?

A. Well, this first final drive went out. Then we replaced tracks, twelve rollers, one sprocket and one idler, and replaced a drawbar, replaced final drive housing, and another rail, and six rollers and a sprocket in the Portland shop. When it came in we put it in there. Then we replaced a drawbar in Portland. That would be two sets of tracks and sprockets and rollers. All the rollers were not replaced. There was twelve at one time and six at another; that is a set and a half; and there was just one sprocket a second time, and one gear, and that was due to the way the material was left going on one side and it would wear one side out faster than the other.

(Testimony of Henry Kuckenberg.)

Q. When you say "replace full final driving housing", what does that mean?

A. I didn't say that.

Q. I beg your pardon. You were turning the page and I misread it. Final drive, then, is a part of the equipment only on one side of the tractor?

A. That is right. [246]

Q. Is that right? A. Uh huh.

Q. Are there final drives on both sides of the tractor?

A. Yes, that is correct. They were both separate. They were both in separate housing.

Q. Am I correct in assuming, Mr. Kuckenberg, that each of these sheets of each of these documents here bound together, namely, in Exhibit 26, is a repair on each of the pieces of equipment up there?

A. Yes. One sheet covers one piece of equipment.

Q. One piece of equipment. So that Tractor 414 that we were discussing, only once necessitated having a final drive replaced?

A. Let me see. Isn't there another one down here? There is another one there. It had two.

Q. Two. All right. You replaced final tracks, as indicated here?

A. I can't say very well, Mr. Wagner. I will have to look at it a little closer.

Q. You read it.

A. This is the one I just got through reading.

Q. How many times did you replace the tracks?

A. Twice.

(Testimony of Henry Kuckenberg.)

Q. Twice? A. That is right. [247]

Q. The one was once?

A. Replaced tracks and twelve rollers, replaced rails and six rollers and one sprocket. Rails and tracks are the same thing.

Q. They are the same thing? A. Yes.

Q. So that twice for 414 as to replacements for each, the final drives and track assemblies; is that right? A. That is correct.

Q. Is that complete track assemblies and parts?

A. This would be just the rails. The complete track assemblies were the parts and cost some eight hundred and some dollars, and the rails, yes, are \$540, so I would know from that they are just the rails.

Q. In this particular situation only the rails went out? A. That is correct.

Q. O. K.

A. Most of them are tracks.

Q. Now I am talking about Tractor 416, on January 27th for replacing the rails, and on March 10th replaced tracks. Is that the same thing?

A. Yes, the same thing; twelve rollers and two idlers.

Q. April 26th, there was a different kind of a job done; is that right?

A. Two sprockets and four top rollers. That was done in the [248] Portland shop when it came in.

Q. Now in connection with the labor that has

(Testimony of Henry Kuckenberg.)

been expended on the job, you have listed a total of labor for the Bremerton part of the job at \$2,120.14 for unusual repairs, and total for labor in the Portland shop at \$5,173.14?

A. Uh huh.

Q. Now is that the same method in computing your labor for the Portland work used as was employed here on the Bremerton situation?

A. Yes, that is right.

Q. Are the same records kept?

A. Yes. We picked out from the payrolls what we felt and what we knew was the labor that went into unusual repairs.

Q. And the labor on ordinary maintenance and repairs for Bremerton was \$4,568, and for Portland was \$19,869; is that right?

A. I would like to see it. (Defendants' Pre-Trial Exhibit 8, and trial, was here passed to the witness.) Those are the repair parts, yes.

Q. And these for repair parts, the figures up here I read, four thousand and nineteen thousand, or is that labor?

A. That is labor.

Q. All right. How many parts for unusual—how much is listed there for unusual labor, as far as parts are concerned?

A. Well, as far as parts are concerned, unusual, \$25,436.86, [249] and ordinary maintenance and repairs \$8,933. That can very easily be explained, because the \$19,000 covers the entire overhaul of the tractors when we came into Portland, which would necessitate a great deal of labor and very few parts

(Testimony of Henry Kuckenberg.)

because we tear the motors down and clean them out, and lots of times they don't need any, but when they have come off of the job we tear into the tractors, when they have been through a severe job like this one was, and on the job our parts would be much higher than they would be in Portland.

Q. How do you account for that?

A. Well, because we were replacing them right there and we try to keep tractors up as best we can cooperate. When they come to Portland they are supposed to come in in fairly good condition, but we have to overhaul the motors and there will be a great amount of labor expended when they come into Portland but not so many repair parts. That is very unusual.

Q. Now we are looking at this item here on Tractor 416; this is page 3 of Exhibit 26, date January 27th, '43, new rails, six rollers and two sprockets.

A. Uh huh.

Q. Parts \$540. A. Yes.

Q. Do you have an original document in your folders? A. Covering tracks?

Q. Covering that—covering parts. [250]

A. Here is four sets of rails and pads; on December 26th, four sets of rails and pads.

Q. In whose writing is that?

A. That looks like Lee Gordon's writing.

Q. Well now, wouldn't there be an invoice from one of the supply houses for rails?

A. Well, we carry quite a stock of parts out at our shop and most of those parts were taken from

(Testimony of Henry Kuckenberg.)

our stock and shipped to the job. There are some bills from Interstate, where the materials were sent direct from the supply houses, but most of the time we could not get them. They didn't have them. So we took them out of our Portland stock and shipped them to the various jobs. That is the way the jobs have been handled.

Q. How big a stock do you carry out there, Mr. Kuckenberg?

A. Oh, I would say fifty thousand dollars in various repair parts.

Q. All new parts?

A. New parts and reconditioned parts, yes.

Q. New and reconditioned?

A. That is right.

Q. Keep those segregated? A. Yes.

Q. New or reconditioned?

A. Oh, surely. About the only thing we could recondition would [251] be a track rail, and that is putting new pins and bushings in it, but on these jobs here—we haven't done that for quite a while, because these wore right out, so there was no reconditioning them. Here is a bill from Interstate Tractor on one set, two-link assemblies or tractor assemblies, one set. That covers one tractor. Here is seven link assemblies here on March 26th.

Q. How many operating hours are there ordinarily in a month, Mr. Kuckenberg?

A. I beg pardon?

Q. How many operating hours are there ordinarily in a month?

(Testimony of Henry Kuckenberg.)

A. Up there we attempted to run two 8-hour shifts part of the time, and I think part of the time we ran two 10-hour shifts, so you could get, if you ran every day you could get five to six hundred hours in a month. We have run equivalent to that much.

Q. How many shifts did you run on this job up there?

A. Sometimes two and sometimes one. We ran according to the weather. If the weather was such that we would run, equipment was in condition and it wasn't broken down, why, we attempted to run two shifts.

Q. That would run pretty close to five hundred hours a month then?

A. If we ran every day.

A. If you ran two shifts? [252]

A. But there was a lot of time down on that particular job. We were in there parts of December, January, February and March, and parts of April. That is almost four months, and we got approximately a thousand hours on each machine.

Q. A thousand hours?

A. So they ran an average of a little over two hundred hours per month.

Mr. Wagner: I think that is all now.

Redirect Examination

By Mr. Gentner:

Q. Mr. Kuckenberg, how did you total up—how did you arrive at the total of \$66,000? Was that added up by adding machine? A. Yes.

(Testimony of Henry Kuckenberg.)

Q. On the total amount actually paid out on payroll and parts? A. For repairs, yes.

Q. For repairs?

A. Yes. That was added up on an adding machine.

Q. This total of \$90,000, that is all expenditures on that job? A. Yes.

Mr. Gentner: That is all.

(Witness excused.)

Mr. Gentner: Now this letter you wanted from the Major is here, from the War Department, March 24, 1943. I want [253] to call the Court's attention to the fact the last paragraph says:

"In the event you remove this equipment prior to completion, thus adversely affecting the completion date of the project, it will be necessary for this office to recommend that your firm be black-listed to other Government agencies in the Northwest.

"Very truly yours, H. L. Morian, Major, Corps of Engineers, Area Engineer."

I will ask that that be introduced in evidence.

Mr. Wagner: No objection.

(The letter dated March 24, 1943, H. L. Morian, Major, Corps of Engineers, Area Engineer, to Kuckenberg Construction Company, so offered, was received in evidence and marked Defendants' Exhibit 35.)

Defendants' Exhibit No. 35

War Department
United States Engineer Office
Seattle, Washington

AD

March 24, 1943.

Address reply to the Area Engineer, Seattle, Washington Area, 1516 15th Ave. West, Seattle, Washington.

Refer to file No. SWA 451 (Kitsap) 7

Kuckenberg Construction Company,
11104 Northeast Holman Street,
Portland, Oregon.

Attention: Mr. Henry Kuckenberg.

Gentlemen:

Reference is made to telephone conversation between Mr. Henry Kuckenberg and Mr. Shugart of this office on March 23rd regarding equipment rented to the A. J. Goerig Construction Company, a prime contractor under the supervision of this office.

On March 20th, 1943, a meeting was held at the Kitsap County Airport project of interested parties regarding the equipment rented the Goerig Construction Company by your firm. It was understood by this office as a result of the meeting, an understanding was reached between all parties. However, on March 23rd, this office received a copy of your letter to the A. J. Goerig Construction Company threatening to terminate their contract and withdraw the equipment as of March 31, 1943.

As the Kitsap County Airport project is behind schedule, every effort is being made by this office to prosecute the work in a most expeditious manner. In the event the equipment in question is withdrawn from the job, the progress of the project would be greatly slowed down pending location and rental of new equipment. As there is only approximately three to four weeks' work left for the equipment, it is strongly recommended by this office that your equipment complete the job.

In the event you remove this equipment prior to completion, thus adversely affecting the completion date of the project, it will be necessary for this office to recommend that your firm be black-listed to other Government agencies in the Northwest.

Very truly yours,

H. L. MORIAN

H. L. Morian,

Major, Corps of Engineers,
Area Engineer.

Mr. Gentner: We haven't anything further, your Honor. That completes our evidence.

Mr. Wagner: I will try to make this very short. I have only one witness. I would like to put on Mr. Rapp.

REBUTTAL

ANDREW LEE RAPP

was thereupon produced as a witness [254] in behalf of the plaintiff in rebuttal and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wagner:

Q. State your name, Mr. Rapp.

A. Andrew Lee Rapp.

Q. What is your occupation, Mr. Rapp?

A. I am an investigator at the Office of Price Administration.

Q. How long have you been so employed?

A. Nearly two years since, —

Q. June 6th, 1943. And in such employment have you had occasion to deal with price regulation in the case of rental and maintenance of equipment?

A. Yes, Mr. Wagner.

Q. And what regulation is that?

A. Why, it is No. 134.

Q. Are you acquainted with Mr. Miller?

A. Yes, Mr. Wagner.

Q. Was Mr. Miller employed at the office when you were there? A. Yes.

Q. Did you in your capacity have to deal with the same regulation that Mr. Miller did in connection with this type of work, rental?

A. Yes. It is the same regulation.

Q. Are you still so employed? [255]

A. Yes, Mr. Wagner.

(Testimony of Andrew Lee Rapp.)

Q. You are acquainted with Mr. Kuckenberg?

A. Yes. I know Mr. Kuckenberg by sight.

Q. Have you had occasion to examine a great many of Mr. Kuckenberg's records.

A. Yes.

Q. And apply the regulation? A. Yes.

Q. In connection with his charges for rental?

A. Yes.

Q. And you made the transcriptions and computations that are introduced here in evidence, indicated as being Plaintiff's Exhibits 5, 6 and 7?

A. Yes.

Mr. Wagner: The record indicates that this may be a typographical error. I just happened to come across it. The record indicates that Exhibit 5 is comprised of three sheets, and our records indicate that there are five.

Mr. Gentner: Which exhibit is that, Mr. Wagner? Which exhibit is that?

Mr. Wagner: Exhibit 5.

Mr. Gentner: Is that Goerig?

Mr. Wagner: Yes.

Mr. Gentner: How many sheets?

Mr. Wagner: We have five altogether [256]

Mr. Gentner: That is what I have, too.

Mr. Wagner: I wonder if we could have a correction of the record on that?

Mr. Gentner: Sure. That is all right.

Mr. Wagner: May I ask, do we have available an extra copy of the regulation?

Mr. Gentner: Did you say something to me?

(Testimony of Andrew Lee Rapp.)

Mr. Wagner: Do we have an extra copy of the regulation?

Mr. Gentner: Yes. Here is an extra copy.

Mr. Wagner: Q. You explain to the Court, Mr. Rapp, just exactly what method you used in computing whether or not there were excessive charges on the part of Kuckenberg Construction Company in connection with the Goerig, Buckler, and Lease & Liegland contracts?

A. Might I have a copy of the transcription I made?

(A copy was here passed to the witness.)

A. That first listed in the transcript the item of equipment, the month in which it worked, the hours which it worked, the charge Mr. Kuckenberg made, his total charges, the ceiling prices that we established, which I will refer to in a minute when I get through explaining this transcription, the total charge based on what I am calling here the ceiling price, multiplied by the hours worked and then deducting that total charge from the total charge Mr. Kuckenberg made, or Mr. Kuckenberg's companies made. That gives, then, the [257] final column, which shows the excessive charge. The ceiling price as we established it is the rental rate per hour that the Kuckenberg Construction Company rented equipment fully operated to the Kaiser Company, Inc., at Vancouver, on the 31st of March, 1942. Our basis for that is Section 1399.6, maximum charges for operating the maintenance services, (a) maxi-

(Testimony of Andrew Lee Rapp.)

mum prices for services were established charges.

One——

Q. What are you reading from now, Mr. Rapp?

A. 1399.6, Mr. Gentner.

Q. And “(a)”?

A. “(a)”. That is right. “If for any operating or maintenance service a supplier had an established charge in effect on March 31, 1942, the maximum charge to any purchaser or lessee for such service shall be the net charge which the supplier would have received on that date from a purchaser or lessee of the same class. ‘Established charge in effect’ means the charge provided in published service charge sheets or the charge regularly quoted, whether such charge was included within the ‘rental’ under a contract on a ‘fully operated’ or similar basis, or was a separate charge for such service.”

Does that answer your question, Mr. Wagner?

Q. Yes. And that is the section that you had in establishing the price that Mr. Kuckenberg had—the ceiling price of Mr. Kuckenberg?

A. Yes. [258]

Q. Or the Kuckenberg Construction Company?

A. That is right.

Q. Referring to the next section, paragraph (b), under point 6, would you say that that was an alternative method of establishing a price, or a similar or an additional method?

A. Well, I would say it was an additional method provided for those who did not have established prices in effect on March 1st, 1942.

(Testimony of Andrew Lee Rapp.)

Q. Then if a lessor of equipment had in effect on March 31, in 1942, a rental price for fully operated equipment, that would be his ceiling price and not the price that is provided for in paragraph "(b)"?

A. That is my understanding, yes.

Mr. Wagner: You may cross examine.

Cross Examination

By Mr. Gentner:

Q. You have a figure of \$8.60 here for tractors, Mr. Rapp, and the figure of \$2.00 for carryalls? That is right, is it?

A. That is right, Mr. Gentner; yes.

Q. And what is that—bare rental, or the operating and maintenance service?

A. That is the entire rental.

Q. That is the fully operated rental?

A. Fully operated.

Q. You have taken the fully operated charge, then, from the [259] Kaiser contract and applied it here on your sheet?

A. That right.

Q. Is that what I understand you have done?

A. Uh huh.

Q. And that is what you have done throughout?

A. That is right.

Q. You have not taken the operating and maintenance service?

A. No.

Q. And put it here?

A. No. All the compilations there are made the same way.

Q. And your basis, then, is that it is the fully

(Testimony of Andrew Lee Rapp.)

operated rate that was established by the Kaiser contract? A. Yes.

Q. Which includes both the bare rental and the operating and maintenance service?

A. Yes; entire charge for the fully operated.

Q. And the ceiling price as you have it established is of the two combined, not the separate?

A. It is the entire charge.

Q. It is the entire charge, both bare rental and operating and maintenance service combined?

A. That is right.

Q. And that is the basis on which you figured this? A. Yes, sir.

Q. And similarly with the Buckler and the Lease & Leigland? [260]

A. The same figures were used, Mr. Gentner; yes.

Mr. Gentner: That is all.

Mr. Wagner: That is all, Mr. Rapp.

(Witness excused.)

Mr. Wagner: That is our case, your Honor.

Mr. Gentner: We rest also, your Honor.

The Court: What is the amount of your claim as the matter stands now, Mr. Wagner? Single damages?

Mr. Wagner: Our claim as to excessive charges on the Goerig transaction is \$18,000, isn't it? I believe eighteen thousand some—we have it here in just a minute.

The Court: Well, that is close enough.

Mr. Wagner: Eighteen thousand some odd dollars.

The Court: What do you understand their claim to be under the head of excessive wear and tear?

Mr. Wagner: Well, they are claiming, under extraordinary wear and tear, the sum of \$13,784.50, as I gather it, that being the maximum that they claim, as estimated by them by virtue of their oral agreement with the Goerig people, based upon a \$2.00 an hour addition. The figures are merely introduced, as I understand it, in order to substantiate that verbal contract.

The Court: Is that your position, Mr. Gentner?

Mr. Gentner: Our position is that we actually paid out [261] \$13,784.50—no; I mean that that is the most that we could claim as an offset for actual, thirteen thousand seven hundred eighty-four, because that is all we charged under our \$2.00 an hour rate.

The Court: And what is the amount of your claim on those other two accounts, Mr. Wagner?

Mr. Wagner: As to the Lease & Leigland, \$615.19, and as to the Buckler Company \$1182.50. The total of the Goerig claim is \$18,822.46.

The Court: And you have no offset against L & L, and Buckler?

Mr. Wagner: No, none, your Honor.

The Court: And, Mr. Wagner, do you want to be heard on that offset—their right to the offset?

Mr. Wagner: No, I think not. I am satisfied that the figure of \$13,784.50 is substantiated by the evidence that we went into.

The Court: All right. That is very fair. And do you want to be heard on the question of trebling the amount, if recovery is allowed?

Mr. Wagner: Yes, I would briefly, your Honor.

The Court: All right. Let me hear you.

Mr. Wagner: There are a number of other things that are introduced that I might also cover.

The Court: What is that? [262]

Mr. Wagner: For example, the immunity claim. There is a claim of the privilege here as to two of these items. That is a matter that Mr. Gentner and I have discussed at some length, too.

The Court: Well, that is in the two smaller accounts?

Mr. Wagner: That is right.

The Court: Well, what is your view about that?

Mr. Wagner: Well, I would just like to be heard on those two, although I am not entirely prepared as to that.

Mr. Gentner: I would be willing, too, to submit that with our views.

Mr. Wagner: I have some authorities I don't have here.

The Court: Yes.

Mr. Gentner: Mr. Wagner and I would be willing to submit that without argument, if you would likewise—that phase of it.

The Court: Well, tell me about this good faith. You are prepared on that?

Mr. Wagner: The only point that I have to argue, your Honor, is that it is a matter entirely of defense, that the statute is conjunctive, that the

defendant must assume to establish that the violations were neither willful, and likewise neither on account of failure to take practicable precautions. I mean both of those elements are a burden on the defendant in establishing his defense, and I don't [263] believe in any sense of the word can Mr. Kuckenberg be said to have taken all of the precautions that he should have or could have taken in eliminating the violation.

The Court: You said there might be some other cause you wanted to be heard upon—this immunity.

Mr. Wagner: On the immunity I have some authorities I don't have with me, I am sorry.

The Court: Well, you send those up to me when you find them. What else especially do you have in mind?

Mr. Wagner: There was mentioned, your Honor, the matter of discrimination, but I believe there was no evidence upon which—

The Court: You don't need to argue that.

Mr. Wagner: That was the only other thing I believe I did have in mind.

The Court: Let me see then if I have the situation as it exists in mind: If I allow you to recover it will only be for single damages, so that leaves then an item of \$5100 approximately on Goerig?

Mr. Gentner: That is right, your Honor.

The Court: And these two smaller items, \$615 and \$1182.

Mr. Gentner: That is right, your Honor.

The Court: And you are going to send me up, if you care to, what you have on immunity. Now

then, in resolving those three items, approximately, \$5037, \$615 and \$1182, or sixty- [364] eight or sixty-nine hundred dollars, I have the choice between these two theories. That is what it amounts to.

Mr. Gentner: That is right, your Honor.

The Court: On which these two gentlemen have differed?

Mr. Gentner: Yes.

The Court: That is what it comes down to, isn't it, Mr. Wagner?

Mr. Wagner: Well, the situation in connection with the second theory that has been injected into this situation results from our position in a much greater overcharge than upon the theory that we have tried the case on.

The Court: All right. You had better state that again. It may be a little different.

Mr. Wagner: As far as the second theory is concerned, that is paragraph (b) of 1399.6, which provides for an approval of rates by the Washington office. The rates there likewise would require the approval of a rate for operating and maintenance. In that connection the excessive charge would be the thirteen thousand dollar item, plus whatever may be in excess of the rates as approved by the Washington office. Just exactly what they are I don't have handy.

The Court: What about that? Is that a new thought to you? Is this something new?

Mr. Wagner: No. [265]

Mr. Gentner: It is new to me. It is sprung for the first time today, your Honor. I can't follow him at all on it—today for the first time, although this has been up for pre-trial since March, and June and July, and August, and I have had my contentions in ever since this time. I have asked Mr. Wagner repeatedly whether he made any contention about unusual wear and tear, and I think the transcript might bear me out, that I not only asked once but about ten times, and received the answer that he was willing to allow as an offset the actual expenditures for unusual wear and tear. That has been incorporated in the pre-trial order, and now today Mr. Wagner, or this evening, takes the position for the first time that unusual—apparently that unusual wear and tear would be an offset if an established charge had been in effect, but would not be an offset if the charge for operating and maintenance services was arrived at by the second method.

The Court: Which is the method that you rely on?

Mr. Gentner: That is right, your Honor.

The Court: Now wait. Are you agreed so far?

Mr. Wagner: No, your Honor.

Mr. Gentner: I thought he would say——

Mr. Wagner: Mr. Gentner has been well aware of the situation, and even called it to your Honor's attention on a number of occasions, the fact that we had changed the theory [266] of our case. That is true. In the original complaint we adopted the second method, that is the approval method. When

it was discovered that on investigation there was in effect during March of '42 an established rate, then we amended our complaint and at that time changed our theory. Now Mr. Gentner was well aware of that situation, and that is the position we have taken all the way through, and I think that Mr. Miller concedes that it is either one or the other, that you can't have both situations, a conglomeration of both methods of pricing in arriving at this result.

The Court: All you are saying, if I quote you correctly, is that an offset for unusual wear and tear does not lie where an approved rate is relied on?

Mr. Wagner: That is right.

Mr. Gentner: Well, that is a proposition that is advanced for the first time today. It is not embodied in the pre-trial. And in spite of repeated demands and questions to Mr. Wagner during the course of the pre-trials we had, not a word was ever said about that, and that is a new proposition that is interjected here for the first time. It is not embodied in the pre-trials, as your Honor will observe, nor in any other proceedings we had here. This claim is made for the first time today, at the time of trial.

Mr. Wagner: Well, of course, your theory of defense is purely a contention, Mr. Gentner, and I think—— [267]

Mr. Gentner: My theory has been laid out here at the time of the pre-trials that were held here. I stated before, not only once but twice, and em-

bodied them in the pre-trial order which was submitted to you and was in your office almost two weeks, and which you went over paragraph by paragraph, which you did sign, was submitted to the Court and was signed by the Court, and my contentions were embodied in there and have always been the same, and this is something that is urged for the first time in the entire history of this case today.

Mr. Wagner: Mr. Gentner, I will just have to disagree with you, because Mr. Miller and Mr. Rapp here spent a lot of time figuring the excessive charges under the first theory, and nothing was said about offset at that time at all. It was only on the application of the method of pricing under paragraph "(a)" that offset was mentioned, and only in that connection, and I think that is very clear to Mr. Miller and it is very clear to Mr. Rapp, and it is your understanding.

Mr. Gentner: I am the lawyer here, Mr. Wagner.

Mr. Wagner: It is your understanding, too, I think.

Mr. Gentner: My understanding is that there is no difference between the two, so far as unusual wear and tear is concerned; nor can I find any, nor did you ever urge any in any of these proceedings; and I not only asked you once but I asked you four or five times at the pre-trial and [268] received the same answer, and there is nothing, if your Honor will observe, in the pre-trial order to that effect;

nothing at all. The only thing that is in there is that the plaintiffs concede that the actual expenditures are an offset. That has been conceded throughout, and now this is a proposition that frankly I don't understand, and which is raised for the first time tonight.

The Court: Well, so long as I am bound to hold as I did in the Wheeler case, that the plaintiff can't recover because the action wasn't brought by the proper authorities, maybe I had better confine my finding to that, because that is the finding I intend to make in the case.

Mr. Gentner: Well, your Honor, there is a very vital question here. I think that goes to the meat of this, and I think that—of course, I realize it is six o'clock here—

The Court: That is all right.

Mr. Gentner: —but I think that in a few minutes I could show your Honor—I am sincere in my belief—that this is another proceeding that is brought on a theory that it is not maintained either by the regulation, nor by the Office of Price Administration itself in Washington, D. C., and I think that I can show, your Honor, that this is a very, very clear example of the necessity that exists for having the Administrator pass upon cases before they are brought, because I can't see, with the letters that I have here, that [269] are in evidence here, how the Washington Office of Price Administration would ever have authorized this case, based upon the theory that it is, in view of the letters that they have written. And I think that clearly

demonstrates the point your Honor raised of the necessity of having the main office pass upon the institution of these cases.

Now if your Honor will remember the last witness, Mr. Rapp, I questioned him particularly as to whether or not the basis of his computations, which are the only computations before your Honor, was the fully operated price or whether it was the operating and maintenance service, and he replied that it was the fully operated price, which combines both bare rental and operating and maintenance service. It must be remembered that there are two component parts of a fully operated rate; that is the bare rental, the rental of the bare equipment itself, and then the operating and maintenance service which constitutes the furnishing of a driver or an operator, the oil and the grease and the repairs for ordinary and usual repairs.

Now there is no provision in this regulation for the establishment as of March 31st, 1942, of a fully operated rate, and that is the only evidence that the plaintiffs have produced before your Honor, evidence of a fully operated rate which was the Kaiser Company rate. The equipment was rented on a fully operated basis at \$8.60 an hour to the [270] Kaiser Company on March 31, 1942. Now the regulation expressly prohibits the establishment of any fully operated rate as of March 31, 1942. Not only does it make no provision for it but it expressly prohibits it.

Section 1399.7 reads:

“If any construction or road maintenance equipment is leased on a ‘fully operated’ basis or on any other basis whereby the consideration represents payment both for the rental of such equipment and for the performance of any operating or maintenance service, such consideration shall not exceed the aggregate of the maximum rental price herein provided for such equipment”, which is the bare rental and which is set forth in a price schedule at 1399.15, and the maximum charge herein provided for such service; that is, for the operating or maintenance service; “and the lessor shall separately itemize on the invoice the rental price and the service charge.” Now here comes the last sentence: “This section shall apply whether or not equipment was leased on a ‘fully operated’ or other lump-sum basis in March, 1942.”

In other words, if equipment was leased on the fully operated basis in March, 1942, still the price that would apply for the bare rental is the schedule of prices attached hereto, and the operating and maintenance service charge which is to be obtained in one of two methods: Either by an established charge in effect for operating and maintenance [271] service only as of March 31, 1942, or by the method of computing the cost of operation and a method which would arrive at a figure was that the charge would bear a normal relation to the competitive price—to the maximum price of a competitive supplier, and that price was to be approved or disapproved by the OPA in Washington.

Now this regulation expressly prohibits the fixing of an established price for bare rental of a piece of equipment, and if you cannot establish the price for the bare rental as of March you cannot establish a fully operated price because the two prices are component parts of a fully operated rate and if you can't establish a price on one part of it you can't establish on the whole. It is true that you can establish a price on the operating and maintenance service, but only on that part alone, not on the bare rental. The original regulation which went into effect on May 11th, 1942, applied only to bare rental of the equipment and it established this schedule of rates for each particular amount of equipment, tractor, scraper, and so forth. As to the operating and maintenance services, the price that had been charged in 1942, or which would have been charged but it was not covered by any regulation until this Amendment No. 3 became effective October 22, 1942, and continued until July 1st, 1943, at which time Amendment No. 9 became effective but change that phase of it. [272]

Now Amendment No. 3 reserved and kept in effect the requirement that there could be no established charge for bare rental, and it added this section, making a provision for the establishment of a maximum price for operating and maintenance service in two different methods; and in that respect it differed from the original regulation, the reason for that being that prior to this price regulation equipment was rented in two ways. Usually equipment houses would rent to a logging concern, send

the tractor out and the logging concern would furnish the operator and the oil and take care of the repairs, and that was your bare rental. However, on construction jobs it was an invariable practice to furnish, not only the equipment itself but also an operator, the gasoline, the oil, and take care of the repairs, because it seems that on construction jobs the party renting in most cases didn't have the crew, and the lessor did have the crew, and greater efficiency was established in that manner. So that we find that equipment was rented fully operated by construction concerns, but the price regulation at no time from the beginning of the original, May 11th, 1942, regulation, right up to the present date, at no time, or at any time, has permitted the establishment of a bare rental price by the price that was charged in March, 1942.

Amendment No. 3 has prohibition in Section 1399.1, [273] specifically prohibiting the renting at any price higher than the price established for bare rental in this regulation. It provides that regardless of any contract, agreement, lease, or other obligation, no person shall lease or deliver any construction or road maintenance equipment at a rental price in excess of the maximum rental price established by the Maximum Price Regulation No. 134.

Then it proceeds to establish that under Section 1399.2, and there it refers to the payment of rates at the back, and provides a definite rate for the day, for the week and for the month, and for rates most favorable to the lessee. All rentals of equip-

ment, whether bare or fully operated, must conform to that section of the regulation, and if it is impossible, as this regulation states—and it even goes so far as, in Section 1399.7, which I have read, to say that this section shall apply, whether the equipment was leased on a fully operated basis in March, 1942, and specifically prohibits the establishment of a rate fully operated in March, 1942, then these plaintiffs have no case. Their entire case stands or falls on the proposition that you may have an established pricing in effect for a fully operated rate as of March, 1942. There is no evidence of anything else.

Now to illustrate just what would happen if their contentiton could be maintained, you have only to take one [274] glance at some of the rentals in these very contracts before the Court. Take the Kuckenberg and Buckler rental; take your Motor Graders No. 601, if you would take the shipyard rate, which is the Kaiser Company rate for bare rental, and figure that on the basis of the bare rental that was set forth in that, and which is the component part of what they are claiming here, you would have for the first one for February \$920.40, but if you figured it in accordance with Regulation 134 on this schedule here you would have \$630. Take the next one, No. 603, for the month of May, if you went by the shipyard rate the one for you would establish a bare rental rate, you would have \$963.30, but if you took the OPA rate here this schedule which they say must be followed, you would have \$583.39.

Take the next one, No. 606 for the month of

March, 1943, according to the shipyard rate here it would be \$1104.68, and according to the regulation here, 134, it would be \$686.77.

On the Goerig case, take the cat and dozer, in each case you would have a higher ceiling if you took this shipyard rate for bare rental than what this regulation permits or allows. Now not only does this regulation not permit it and does prohibit such a rate, but the Washington Office of OPA itself has consistently so held by letters. In fact, the letter that the plaintiffs themselves introduced in evidence here as part of their case, which is a letter from [275] the Washington office, so states. We had this letter of Kuckenbergl to the OPA in Washington as of January 5th, which said as follows:

“We herewith submit rental rates, which apply to road maintenance equipment on a fully operated basis. The following rates have been in effect during the year 1942”.

All right. Now here comes the answer:

“This will acknowledge receipt of your letter of January 5, 1943, in which you submit rental rates applying to road maintenance equipment leased by you on a fully operated basis.

“Section 1399.7 of Maximum Price Regulation No. 134”, which is what I read, your Honor, “provides that lessors must bill separately the bare rental rates not in excess of the maximum rates listed in Appendix A and operating and maintenance service charges as established by this office.”

Now here comes the point: "This Section operates, therefore, to prevent any establishment of a fully operated rate."

That comes right from Washington.

Now I have further letters to the same effect. They are in evidence here. Here is a letter February 27th, 1943, to the United Contracting Company. This was from the Washington office:

"We have received your letter of February 16, 1943, in which you report a rental agreement with the Kaiser Company [276] of Vancouver, Washington, which provides for a rental of one Model No. 77 Austin Western Motor Grader for 100 hours at \$7.60 per hour fully operated.

"Maximum Price Regulation No. 134 does not provide for a fully operated contract."

And then they go on in detail and explain why not. It is against Section 1399.7.

Here is a letter to Mr. Ralph R. Gay, at Longview, from the Washington office again, May 7th, 1943:

"Reference is made to your letter and attached schedule dated April 16, 1943, submitting for approval your rental rates for certain equipment."

Now here we are: "Although your rental prices were in effect March 31, 1942, they were on a fully operated basis, combining rental and maintenance plus the hourly charge for operating labor. Section 1399.6 of Maximum Price Regulation 134 states, 'If on March 31, 1942, however, a lessor leased construction or road maintenance equipment on a', then they recite this section. "Inasmuch as you were

not renting on a 'bare' basis on March 31st, 1942, the foregoing Section of Maximum Price Regulation 134 cannot be applied"; and they refused to admit it and they stated that fully operated rates as of March 31st were not approved and could not be in effect under this regulation.

Now here comes another letter, which is a letter [277] by the Mid-Columbia Sand & Gravel Company, May 11th, 1943, in which they set forth fully operated rates on their tractor and other equipment, and here is the answer from the Washington office on May 27th, 1943:

"Reference is made to your letter dated May 11th, 1943, submitting for approval your fully operated charges for certain equipment.

"Although your rental prices were in effect March 31, 1942, they were on a fully operated basis, combining rental maintenance plus the hourly charge for operating labor."

Now again they quote their regulation and state that there can be no such a rate in effect. The Washington office itself, both in this letter to Mr. Kuckenberg and to these other parties, has held there can be no such rate.

Now the plaintiff comes in here and bases the entire case upon the claim that there has been a fully operated rate established, when we find that the Washington office denies that that can be done, and a careful reading of this regulation will show that it not only cannot be done but it is expressly prohibited; and, therefore, I say to your Honor,

in all sincerity, that I am satisfied that a careful reading of this regulation alone discloses that there is no basis for any here on the part of the plaintiffs and that the plaintiffs have not made out any case. There can be no fully operated rate as of March 31, 1942, and there is no [278] evidence, or anything else except a fully operated rate. The rate provided by its regulation in Appendix A for bare rental is of a sliding scale, based upon possession time, and as one of our exhibits here shows, the rental under this price Appendix A schedule varies—is not a fixed rate; it varied on the Goerig job on the case of Tractor No. 48 from \$4.07 per hour to \$15.60 per hour for bare rental. It varied in the case of Tractor No. 411 from \$3.82 per hour to \$25.61 per hour. That is the analysis prepared by Mr. Miller, which is in evidence.

In the case of Tractor No. 417, with carryall, the rent varied from \$6.88 per hour to \$17.65 per hour. Likewise with all of the other equipment. There is no fixed rate provided per hour for the rental of their equipment by this Maximum Price Regulation, and yet the basis for the prosecution here is a fixed rental for bare equipment as a component part of what is claimed to be a fully operated rate.

Now if the price were figured as provided by this regulation, this computation is entirely erroneous, and as the computation will show that Mr. Miller has figured, he has figured it in accordance with the price regulation, showing how the price varies and how the rates differ, so far as bare rental is con-

cerned. The price for operating and maintenance service is a constant one and applies regardless of the number of hours, but the bare rental rate under [279] this regulation, which was in effect, is a fluctuating one, which depends on possession time and the hours of operation and there can be no other basis than the one provided in this regulation, and, therefore, I say that there is no case to submit to your Hoonr at all by the plaintiffs; that they have failed to make out a case at all of any violation at all; and I am satisfied that if the Washington Office of the OPA, from whom these letters came, which are clear and explicit, had had an opportunity to pass upon this before this prosecution commenced upon this theory and upon this basis, or if it were submitted even, knew that there would be no prosecution on this basis because, consistently with what they have repeatedly and always held, there cannot be any fully operated rate established as of March, 1942, nor could there have been any up to the Amendment No. 9 on July 1st, 1943, at which time provision was made for a fully operated rate upon application from Washington and not prior to that time. There was no provision at all. Prior to that time it had had a combination of the bare rental rate in this schedule, plus the operating and maintenance rate, which was fixed in one of the two methods. Now we claim that we had no operating and maintenance rate established as of March 31, 1942, and that is borne out by Mr. Miller, who said that not a single person in this entire territory qualified under that section. He was right there in the

office up to the time that Amendment [280] No. 9 went in, and that is because the Office of Price Administration held that unless you were renting equipment both on a bare basis and on a fully operated basis, you could not have an established charge in effect for your operating and maintenance service, and, therefore, we were obliged to proceed under Section B, which is a rate which is made up of the operating costs and a method appropriate to the service to be rendered resulting in a price bearing a normal relation to the maximum price to the competitive system approved or disapproved by Washington. We have an approved price here, upon which we proceeded and upon which Mr. Miller figured the entire jobs, and which show that in each case we are under the Maximum Price allowed by the regulation, figuring our prices upon the bare rental in this schedule, and upon the price allowed by Washington in the letter of February 5th, 1943. And, therefore, it is our contention, your Honor, that the plaintiffs absolutely have no basis or foundation for any prosecution in this case.

Mr. Wagner: Your Honor, this matter was submitted to the Washington office before these proceedings were instituted, and there are lengthy and detailed reports and computations, and the original computation, that is the basis for the original complaint that was filed, which excluded, or which was not inclusive of the Buckler or the Lease & Leigland transactions but included only the Goerig transaction, the [281] treble claim amounted to \$85,-

077.84, which was three times \$28,359. 28. That was the computation of the Washington office as based upon the approved rates.

Now after it was discovered that there was in effect on March 31st of '42 an established rate by the Kuckenberg Construction Company, and that it gave them the benefit of a higher rate, naturally we amended our claim to make it conform to what we thought it was best for them to have, and that was approved also by the Washington office upon discovery. However, the method of pricing, as was used, was that of Paragraph A of the regulation and not Paragraph B on the approved price.

Now Mr. Gentner's argument to me seems—from the reading of those letters he seems to argue himself just exactly and squarely out of the point he is attempting to make, and that he can have the advantage of pricing under both of these systems, namely, to have the offset and also to have the approved rate. These letters indicate that unless there is a rate that is approved under this second method of pricing, unless there is an approved rate, that the man doesn't have that and anything that he charges would be excessive.

Now I think that the language is clear and simple.

Mr. Gentner refers to Section 1399.7 and calls it a prohibition against the establishment of a fully operated rate. It is not a prohibition at all. All it is to keep [282] somebody who had an excessive fully operated charge as based upon an abnormal rental charge from using that charge where a com-

bination of both the bare rental and the service and maintenance charge would result in an excessive charge. Now it is possible that, in order to get one; the other has to be deducted but the particular paragraph was directed against the type of operator who had a regular maintenance charge in March of '42, and also had a rental charge, and where the combination of both of those would exceed a combination of the maintenance charge and the charge for the bare rental is set forth by this regulation. This is the paragraph that holds them down, and it does it in very simple language. It says:

“If any construction or road maintenance equipment is leased on a fully operated basis or on any other basis whereby the consideration represents payment both for the rental of such equipment and for the performance of any operating or maintenance service, such consideration shall not exceed the aggregate of the maximum rental price herein provided for such equipment and the maximum charge herein provided for such service, and the lessor shall separately itemize on the invoice the rental price and the service charge. This section shall apply whether or not the equipment was leased on a fully operated or other lump-sum basis in March, 1942.” [283]

It just means that if the person that had a service charge had a great big rental charge up there he had to come down to his established service charge, plus the bare rentals as set forth in here.

Mr. Gentner: Mr. Wagner, if you had charged on March 31st, 1942, fully operated rate, which

exceeded the bare rental rate provided by the appendix here, plus the operating and maintenance rate, then how would you say that you would get around that angle?

Mr. Wagner: If you didn't have an established service charge, but you have only a fully operated charge, that is your charge of March of '42, but if you have a service charge established and the rental charge, which in the aggregate exceed your service charge as established, plus the bare rental charge as provided for any schedule, you will pull down to that. That is just very simple.

Mr. Gentner: Is it your contention you could not have a pure rental charge established as of March 31, 1942?

Mr. Wagner: I don't understand you.

Mr. Gentner: You know what a pure rental charge it?

Mr. Wagner: Yes.

Mr. Gentner: Do you say it was impossible to establish a pure rental charge as of March 31, 1942?

Mr. Wagner: To establish it?

Mr. Gentner: Yes. [284]

Mr. Wagner: No. That is set forth in the regulation.

Mr. Gentner: Well, you admit that your fully operated rate is comprised of pure rental and operating and maintenance service?

Mr. Wagner: That is right.

Mr. Gentner: If you can't establish your pure rental charge how can you have a fully operated

rate established, then? Doesn't your pure rental rate fluctuate with the hours of possession?

Mr. Wagner: Certainly, Mr. Gentner. It is very simple. Where an operator had only a fully operated rate at this particular time, without having an established service charge, why, his service charge was the difference between this rental and his total fully operated rate.

Mr. Gentner: You take in the Kaiser case, do you say that that was the established——

Mr. Wagner: The situation that you are——

Mr. Gentner: Now just a minute.

Mr. Wagner: The situation that you are talking about has since been changed by amendment to the regulation.

The Court: That was in July, 1943.

Mr. Gentner: We are talking about that particular time. That is right.

The Court: Yes, that is right.

Mr. Wagner: That is right. [285]

Mr. Gentner: Is it your contention—of course, your contention is that a fully operated rate was established by the Kaiser Company contract and that consisted of pure rental as well as operating and maintenance service. You are not contending that an operating and maintenance service charge alone was established by the Kaiser contract, are you?

Mr. Wagner: It is the only rental as established on that date, and the fully operated charge.

Mr. Gentner: Sure. If you take your pure rental, according to the regulation, that would vary, and yet your figures here are exactly identical, are they not? They don't vary a bit?

Mr. Wagner: That is right.

Mr. Gentner: How can it be——

Mr. Wagner: That is the ceiling that is established.

Mr. Gentner: How can there be an identical charge where the number of hours varies from 54-1/2 in a month up to over 240? How could you have an identical charge under this regulation 134?

Mr. Wagner: Because you are revised in 1399.6 (a). It is the single method of pricing, as does Mr. Miller agree.

Mr. Gentner: Mr. Miller does not agree to anything of that kind. Whether he did or not it would not affect it, Mr. Wagner, you will admit.

The Court: The bare retinal is decreased by 50 per cent [286] after 240 hours of operation, is it not?

Mr. Wagner: Not in Mr. Kuckenberg's situation.

The Court: I mean according to the regulation?

Mr. Wagner: No. That is according to regulation.

Mr. Gentner: According to the regulation it is decreased 50 per cent after 240 hours, it is not?

Mr. Wagner: Not Mr. Kuckenberg's operating rate.

Mr. Gentner: Well, is he in a different class from anybody else under this regulation?

Mr. Wagner: Well, he has got an established rate on March 31st of '42, and it is right there in the regulation, and that is one method of pricing.

Mr. Gentner: Where is it in the regulation? I can't find anything that provides for operating and maintenance service only and says nothing about bare rental.

Mr. Wagner: It certainly says here for the operator, Mr. Gentner.

Mr. Gentner: Where does it say that? It says, "Maximum charges for operating or maintenance service", 1399.6. Your prices for maximum rental prices are 1399.2. You could not have a rate that is identical, even the way you have it here, except after 240 hours the price goes down by 50 per cent, and it is impossible to have an even rate.

Mr. Wagner: I will grant you, under one method of pricing that is true, but not under the point 6 method that Mr. Kucken- [287] berg claims.

The Court: He was going to read you something different there. You didn't give him a chance to read it.

Mr. Gentner: All right. Let him read it.

Mr. Wagner: I ask Mr. Gentner to read it.

The Court: I would like to hear it.

Mr. Gentner: "If for any operating or maintenance service a supplier had an established charge in effect"——

Mr. Wagner: Wait just a minute, Mr. Gentner.

Mr. Gentner: —"on March 31, 1942, the maximum charge to any purchaser or lessee for such service should be the net charge which the supplier

would have received on that date from a purchaser or lessee of the same class. 'Established charge in effect' means the charge provided in published service charge sheets or the charge regularly quoted, whether such charge was included within the 'rental' under the contract on a 'fully operated' or similar basis, or was a separate charge for such service. If on March 31, 1942, however, a lessor leased construction or road maintenance equipment on a 'fully operated' or similar basis and also on a 'bare' basis, the established charge in effect on March 31, 1942, for the operating or maintenance service provided in the contract for such equipment on the 'fully operated' or similar basis, when supplied in connection with the rental of such equipment, shall be the difference between the 'rental' price [288] in effect on March 31, 1942, of such equipment on the 'fully operated' or similar basis and on the 'bare' basis. 'Net charge' means the amount charged to the purchaser after adjustment for all applicable extra charges, discounts and other allowances in effect on March 31, 1942."

That absolutely furnishes a method only for pricing operating or maintenance service and not for both operating or maintenance and rental of equipment, which is taken care of in Section 1399.2. There is nothing in there that says there is anything except charge for operating or maintenance service absolutely. There can be no established charge for anything but operating or maintenance service.

The Court: We will adjourn now, Gentlemen, and we will hear you, Mr. Gentner.

(Thereupon, at 6:32 o'clock P.M., Court was adjourned.) [289]

[Title of District Court and Cause.]

REPORTER'S CERTIFICATE

I, Alva W. Person, hereby certify that I reported in shorthand all of the proceedings had and evidence given upon the trial of the above-entitled cause on Tuesday, November 14, 1944, in the above-entitled court, before the Honorable Claude McCulloch, Judge, and thereafter prepared a typewritten transcript from my shorthand notes so taken, and the foregoing and hereto attached 196 pages of typewritten matter, numbered 94 to 289, both inclusive, contains a full, true and accurate transcript of my shorthand notes so taken by me as aforesaid of the proceedings had and evidence given upon said trial.

Dated at Portland, Oregon, this 8th day of March, A.D. 1945.

ALVA W. PERSON
Court Reporter

[Endorsed]: Filed Aug. 26, 1944. [290]

[Endorsed]: No. 11021. United States Circuit Court of Appeals for the Ninth Circuit. Chester Bowles, Administrator, Office of Price Administration, Appellant, vs. Henry A. Kuckenberg, Lawrence W. Kuckenberg and Harriet A. Kuckenberg, co-partners doing business under the assumed name of Kuckenberg Construction Company, Appellee. Transcrit of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed April 22, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the Circuit Court of Appeals of the United
States in and for the Ninth Circuit

No. 11021

CHESTER BOWLES, Administrator,
Office of Price Administration,
Appellant,

v.

HENRY A. KUCKENBERG, LAWRENCE W.
KUCKENBERG and HARRIET A. KUCK-
ENBERG, co-partners doing business under
the assumed name of KUCKENBERG CON-
STRUCTION COMPANY,

Appellee.

STATEMENT OF POINTS

On the appeal taken in the above entitled action

the appellant, Chester Bowles, Administrator of the Office of Price Administration, will urge and rely upon the following points:

1. The Court erred in finding as a fact and concluding as a matter of law that the institution and prosecution of this action was unauthorized.

2. The Court erred in finding that the defendants do not have and did not have any established ceiling price as of March 31, 1942, for fully operated tractors, fully operated carry-alls, fully operated graders or fully operated tractors and carry-alls together.

3. The Court erred in finding that the plaintiff offered no evidence of any violation by the defendants of Maximum Price Regulation No. 134, either during the period that Amendment No. 3 was effective or thereafter during the period in which Amendment No. 9 was effective.

4. The Court erred in finding that the consideration at which the construction and road maintenance equipment involved in this action was rented or leased did not exceed the aggregate of the Maximum Rental Price provided by Maximum Price Regulation No. 134 for such equipment and the maximum charge provided by said regulation for operating maintenance service furnished by the defendants.

5. The Court erred in finding that the defendants have proved that they acted in good faith in making the charges they did for rental of equipment and furnishing of operating and maintenance services and for the repair of damage caused by

unusual wear and tear and breakages, and that defendants' violation of the Emergency Price Control Act of 1942 and Maximum Price Regulation No. 134 was neither willful nor the result of a failure to take practicable precautions against the occurrence of the violation.

6. The Court erred in concluding as a matter of law that Maximum Price Regulation No. 134 does not provide for the establishment of a fully operated rate as of March 31, 1942 for any construction or road maintenance equipment, and that any leasing or rental of construction or road maintenance equipment on a fully operated basis on March 31, 1942 does not operate to establish said fully operated rate as a ceiling price upon which any claimed violation of Maximum Price Regulation No. 134 may be based.

7. The Court erred in concluding as a matter of law that defendants were entitled to charge A. J. Goerig Construction M. two dollars per hour for tractor operating time for unusual wear and tear, and that the charge of thirteen thousand seven hundred eighty four dollars and fifty cents (\$13,784.50) made by defendants was a proper charge for unusual wear and tear.

8. The Court erred in concluding as a matter of law that defendants did not violate the Emergency Price Control Act of 1942 or Maximum Price Regulation No. 134.

9. The Court erred in concluding that defendants are entitled to judgment.

HERBERT H. BENT

Acting Regional Litigation

Attorney

F. E. WAGNER

District Enforcement

Attorney

Attorneys for the Appellant.

[Endorsed]: Filed May 29, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD

Appellant herein designates the entire certified transcript, including all exhibits, to be contained in the printed record on appeal herein.

HERBERT H. BENT

Acting Regional Litigation

Attorney

F. E. WAGNER

District Enforcement

Attorney

Attorneys for the Appellant.

[Endorsed]: Filed May 29, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

ORDER

The parties hereto having by stipulation so agreed it is now by the Court

Ordered: That in printing the transcript herein the Court omit Exhibit No. 1 save and except change Order D and change Order E, and Exhibits Nos. 2, 27, 28, 29, 30, 31, 32, 33, 34 and 36 in the Court below, but that said exhibits may be considered by this Court on this appeal as fully as though printed.

Dated: June 12, 1945.

FRANCIS A. GARRECHT

Circuit Judge

[Endorsed]: Filed June 12, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION

It is hereby stipulated and agreed between the above entitled parties by and through their respective attorneys that defendant's exhibits numbered 1, save and except, Change Order D and E, Exhibits numbered 2, and 27, 28, 29, 30, 31, 32, 33, 34 and 36 may be omitted from the printed record or transcript on appeal herein, but that said exhibits may still be considered by the Court as part of the record on said appeal.

In accord with the Designation of Record herein on file, all exhibits will be contained in said printed record on appeal, save and except as hereinabove indicated they be omitted.

HERBERT H. BENT

F. E. WAGNER

Of Attorneys for Appellant

ALBERT N. GENTNER

Of Attorneys for Appellee

[Endorsed]: Filed June 12, 1945. Paul P. O'Brien, Clerk.

